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No. __________

In The

Supreme Court of the United States

October Term, 1989

YALE LUBMAN, THOMAS J. MURPHY,
JOHN S. SEISS AND JOSEPH STEWART,

Petitioners,

v.

MAYOR AND CITY COUNCIL OF
BALTIMORE CITY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE MARYLAND COURT OF APPEALS

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QUESTIONS PRESENTED

Ordinances adopted by the City of Baltimore, similar to many such state, city and county statutes and ordinances involving hundreds of billions of dollars of assets, require the trustees of public employee pension funds to divest those funds of securities of all American companies doing business in South Africa and bar the trustees from buying any such securities.

The questions presented are:

1. Does local legislation that seeks to influence the internal policies of a foreign nation and by its mandate thereby passes judgment upon those policies impermissibly intrude upon the exclusive power under the Constitution of the Federal Government to conduct foreign relations?

2. Does local legislation that restricts the purchase and sale of billions of dollars of securities, based on whether the securities issuers do business in a foreign nation, violate the Commerce Clause of the United States Constitution and infringe upon the power of the Federal Government to regulate interstate and foreign commerce?

3. Is local legislation that seeks to pressure American companies to stop doing business in South Africa preempted by the Federal Government's policy which encourages American companies to do business in South Africa?

4. Does local legislation that reduces the value of the benefits paid to beneficiaries from public employee pension trust funds, contributions to which were made by the beneficiary-petitioners, effect a taking of the petitioners' property without due process and therefore violate the Fifth and Fourteenth Amendments to the United States Constitution and also violate the impairment of contract clause of Art I, § 10 of the Constitution?

PARTIES TO THE PROCEEDING

The parties before the Maryland Court of Appeals were: The Board of Trustees of the Employees' Retirement System of the City of Baltimore, The Board of Trustees of the Fire and Police Employees' Retirement System of the City of Baltimore, The Board of Trustees of the Elected Officials' Retirement System of the City of Baltimore, Hyman Aaron Pressman, Charles H. Whittum, Jr., William E. Dix, Harry Deitchman, Bishop L. Robinson, Henry G. Parks, Jr., Kenneth P. Taylor, Charles F. Peace, III, Edward C. Heckrotte, Sr., Gary W. McLhinney, Mildred Zink, Yale Lubman, Thomas J. Murphy, John S. Seiss, Joseph Stewart and the Mayor and City Council of Baltimore. The plaintiff trustees of the pension funds have not petitioned for a writ of certiorari. The sole petitioners are the intervenor-beneficiaries, Yale Lubman, Thomas J. Murphy, John S. Seiss and Joseph Stewart.

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MISCELLANEOUS

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The petitioners Yale Lubman, Thomas J. Murphy, John S. Seiss and Joseph Stewart respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Maryland Court of Appeals, entered in the above-entitled proceeding on September 1, 1989.

DECISIONS BELOW

The decision of the Maryland Court of Appeals is reported at 317 Md. 72 (1989) and is reproduced at Appendix (App.) D. Page references are to the version in the appendix. The decision of the Circuit Court for Baltimore City is unreported. It is reproduced at Appendix E.

JURISDICTION

The decision of the Maryland Court of Appeals, a final decision by the highest state court in Maryland, review of which is sought in this petition, was entered and filed on September 1, 1989. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1257(a).

STATUTES INVOLVED

The relevant sections of the United States Constitution are set forth in Appendix A. The Comprehensive Anti-Apartheid Act of 1986 is set forth in Appendix B. The Baltimore Ordinance pertaining to the Employees Retirement System and the Fire and Police Employees Retirement System is set forth in Appendix C, as is its predecessor Bill.

STATEMENT OF THE CASE

In 1986, the Baltimore City Council passed, and on July 3, 1986 the Mayor of Baltimore signed, Ordinance No. 765, which provides, among other things, that no funds of the Employees Retirement System and the Fire and Police Employees Retirement System (two pension plans for retired employees of the City of Baltimore, Maryland) shall remain invested in, or in the future shall be invested in, the securities of any company doing business in or with South Africa. App. C-2, C-3-4. Subsequently, Ordinance No. 792 was passed with substantially the same provisions to cover the Elected Officials Retirement System. App. D-5.

Ordinance No. 765 and Ordinance No. 792 (the "Ordinances") were passed to implement and carry out the purpose of Bill No. 677, which in its "whereas" clauses denounced the government of South Africa for its "morally repugnant" policy of apartheid and asserted that the investment of American capital in South Africa contributed to "the maintenance and enforcement of apartheid." App. C-9. Ordinance No. 765 (Ordinance No. 792 is ommitted as redundant) and Bill No. 677 are reproduced at Appendix C. The Ordinances are similar to many such statutes and ordinances enacted by other

states, cities and counties throughout the country which seek to limit or bar investment by U.S. companies in politically "disfavored" countries.

Under each of the Baltimore pension systems, members are entitled to specific future benefits (defined benefits). The systems also provide for "variable benefits" programs which result in additional payments for retirees directly related to the rate of return earned by the funds. If the rate of return in a given year exceeds 7.5%, all of the excess between 7.5% and 10% is allocated for the payment of additional benefits. If the rate of return exceeds 10%, one-half of the excess over 10% is allocated to the payment of additional benefits while the City receives the other half. App. D-2.

The trustees of the three City of Baltimore employee pension funds (the Employees Retirement System, the Fire and Police Employees Retirement System and the Elected Officials Retirement System) challenged the constitutionality of the Ordinances.

At the inception of the lawsuit four beneficiaries, petitioners herein, one current and one retired member of each of the two major pension systems, the Employees Retirement System and the Fire and Police Employees Retirement System, moved to intervene. The Circuit Court for Baltimore City reserved decision on the intervention motion, but permitted the beneficiaries to move for summary judgment, along with the trustees, and to argue and brief the merits. In their motions for summary judgment the trustees and beneficiaries challenged the Ordinances on the following grounds:

1. the ordinances intrude on the exclusive power of the Federal Government to conduct foreign relations under the Constitution;
2. they infringe on the power of the Federal Government to regulate interstate and foreign commerce and violate the Commerce Clause;
3. they are preempted by the policy of the Federal Government toward South Africa and the Comprehensive Anti-Apartheid Act of 1986;
4. they work a taking of the beneficiaries property without due process and violate their rights under the Fifth and Fourteenth Amendments;

5. they impair the contracts between the beneficiaries and the City in violation of Article I, § 10 of the Constitution.

The Circuit Court denied the motions for summary judgment, except for the claim of impairment of contract, which it set down for trial to hear evidence concerning the financial impact of the Ordinances. The Circuit Court also denied the beneficiaries' motion to intervene.

After trial, the Circuit Court filed its Opinion and Order, dated July 17, 1987, upholding the constitutionality of the Ordinances. The Circuit Court found that the Ordinances barred investments in 120 of the 500 companies on the Standard & Poor's 500 ("S&P 500") list and that these companies represent approximately 40% of the market capitalization of the S&P 500. App. E-23. The Circuit Court further found that the initial cost of divestment would be $750,000 and the ongoing cost would be $1.2 million per year. App. E-30-31. Concluding that the Ordinances would minimally impact the pension funds, the Circuit Court rejected the impairment of contract argument.

The trustees and beneficiaries thereupon appealed to the Maryland Court of Special Appeals, but, at their request, the Maryland Court of Appeals issued a writ of certiorari allowing a direct appeal to the highest court of Maryland because of the importance of the issues.

On September 1, 1989, the Maryland Court of Appeals (sometimes the "Maryland court") rendered its decision. It held that the trial court erred in not permitting the beneficiaries to intervene and modified that judgment by granting the beneficiaries' motion to intervene. In all other respects the Maryland Court of Appeals affirmed the Circuit Court.

The Maryland Court of Appeals addressed each of the issues raised by the trustees and beneficiaries. In doing so the Maryland court operated from the premise that the purpose of Baltimore in enacting the Ordinances "was simply to ensure that the City's pension funds would not be invested in a manner that was morally offensive to many Baltimore residents and many beneficiaries of the pension funds." App. D-61. With respect to the argument of petitioners that the

Ordinances impermissibly intrude upon the federal government's exclusive power to conduct the foreign policy of the United States, the Maryland court held that "the Ordinances do not intrude upon the federal government's authority to conduct foreign relations." App. D-66. It sought to distinguish this Court's decision in *Zschernig v. Miller*, 389 U.S. 429 (1968) by asserting that the Oregon statute involved there made "unavoidable judicial criticism of nations established on a more authoritarian basis than our own," whereas the Ordinances merely represent "a simple, general decision by Baltimore, mandating the divestment of the City's pension funds." App. D-61.

The Maryland court rejected the argument that the Comprehensive Anti-Apartheid Act of 1986, Public Law 99-440 (the "Act") explicitly or implicitly preempts the Ordinances, finding no inconsistency between the Ordinances and the Act. The Maryland court did not address the issue of preemption by federal government policy.

With respect to the challenge based on the Commerce Clause and intrusion upon the right of the federal government to regulate interstate and foreign commerce, the Maryland court concluded that Baltimore was a "market participant" in regulating the purchase and sale of securities by the Ordinances. It relied on several decisions of this court, including *United Bldg. & Constr. Trades Council v. Mayor of Camden*, 465 U.S. 208 (1984); *White v. Mass. Council of Constr. Employers*, 460 U.S. 204 (1983); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980); and *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976). It applied the market participant doctrine to the area of foreign commerce.

The Maryland court also held that even if the Ordinances were not exempt from Commerce Clause scrutiny because of the market participant doctrine, they would nevertheless survive such scrutiny. Although it acknowledged that the Ordinances "impose some burden on interstate commerce", the Maryland court concluded that the burden was "not excessive in relation to the benefits." App. D-82.

The Maryland court responded to the petitioners' Fifth Amendment "taking" claim first by recognizing that "[t]he

economic impact of the Ordinances might be to deprive the beneficiaries of some variable benefits they would otherwise receive if the Ordinances were not in effect," App. D-44, but concluding that the economic impact was mitigated by several factors and there was no "takings" under the tests articulated by this Court in *Connolly v. Pension Ben. Guar. Corp.*, 475 U.S. 211 (1986) and *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

Although the Maryland court agreed that the pension funds created contractual duties on the part of Baltimore toward the beneficiaries and that the beneficiaries had contractual rights to variable benefits and these benefits would be adversely impacted by the Ordinances, it held nevertheless, that there was no impairment of contract because the change in the variable benefits would be insubstantial. The Maryland court recognized that "in absolute terms, the costs of divestiture may be large," App. D-38, n.36, but found that "the costs are *de minimis* when viewed in relation to the systems' total assets." App. D-38, n.36.

The Maryland court also rejected the trustees' argument that the trustees' duty of prudence was altered by the City's mandate that social factors would govern what investments should be made. The Maryland court relied on a principle of trust law that trustees may consider social factors in deciding on what securities to buy and sell.

The federal issues on which review is sought in this Court were first raised in the initial pleadings of the trustees and of the petitioners herein and were subsequently raised at each stage of the proceedings. The decision of the Maryland Court of Appeals, review of which is sought, refers to these issues on page 6 of its decision, App. D-6, and the Circuit Court for Baltimore City refers to them on page 5 of its decision. App. E-5.

REASONS FOR GRANTING THE WRIT

I. This Case Involves Important Issues of Law That Should be Resolved By This Court

A. Foreign Policy

As the Constitution enters its third century, this Court has the opportunity, by granting this petition, to clarify and reaffirm a major purpose of the Constitution: to place control of foreign relations firmly in the hands of the national government, and to create a unified nation, rather than a confederation of semi-autonomous states. The Baltimore Ordinances violate this principle and the Maryland court's decision must therefore be reversed.

In 1788 James Madison wrote in *The Federalist*: "If we are to be one nation in any respect, it clearly ought to be in respect to other nations." *The Federalist No. 42*, at 279 (J. Madison) (J. Cooke ed. 1961). Yet 200 years later, by one author's estimate, more than one thousand state and local governments are participating in foreign affairs, and the number is expanding. Shuman, *Dateline Main Street: Local Foreign Policies*, FOREIGN POLICY, No. 65, Winter 1986-87, at 154. It must be as clear today, as it was 200 years ago, that the national interest requires that local interference in foreign and defense policy – the cornerstones of our national identity and survival – be curtailed lest the federal government find itself embarrassed or worse by hundreds of would-be state departments pursuing their own "diplomatic" and political agendas.

State and local governments are presently involved in a variety of activities with international aspects or consequences. Many of these activities – promotion of foreign investment in a city, "sister cities" programs, student exchanges, and the like – are seemingly or actually innocuous. Some are more problematic, as when state or local legislatures adopt non-binding resolutions expressing their views on matters of international concern. However, when, as in the case at bar, localities adopt prescriptive legislation that purports to have binding impact on the activities of Americans abroad or on the conduct of foreign governments, such

local legislation must give way to the national foreign policy power, because it may be in conflict with United States policy, or cause the foreign country embarrassment or injury and thus it has a direct impact on our foreign relations and is invalid. Local actions to express or implement municipalities' "foreign policies" have taken a variety of forms with respect to a variety of foreign policy issues: in the days of the "cold war," localities sought to bar or limit the activities of Soviet bloc diplomats or commercial organizations such as the Soviet airline (see, e.g., *United States v. Glen Cove*, 233 F.Supp. 145 (E.D.N.Y.), *aff'd per curiam*, 450 F.2d 884 (2d Cir. 1971); *see also*, Note "Acts by State Governments Affecting Foreign Relations – Decision of New York and New Jersey Governments to deny Soviet Airplane Clearance to Land, Sept. 1983," 25 HARV. INT'L L.J. 200 (1984). States and localities have expressed their disapproval of the taking of American hostages in Iran, *see, Tayyari v. New Mexico State Univ.*, 495 F.Supp. 1365 (D.N.M. 1980). They have expressed their disapproval of the treatment of Catholics in Northern Ireland; and in the instant case, they have sought to denounce and influence South Africa's racial policy by penalizing United States companies that do business in or with South Africa.[1]

The Ordinances at issue here are similar to divestment statutes or ordinances enacted by 19 states, 51 cities and 9 counties, at recent count. California, Connecticut, Massachusetts, Missouri, New Jersey and Oregon, for example, have passed divestment statutes. In addition to Baltimore, such major cities as Boston, Dallas, Denver, Detroit, Houston,

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[1] In an analogous field, many cities, including Berkeley, Chicago, Jersey City and Oakland, have passed "nuclear free zone" ordinances, an example of local and state govenments intruding upon the exclusive power of the federal government to conduct our defense policy, often an aspect of and related to our foreign policy. These ordinances generally prohibit the production of nuclear weapons, prohibit city contracts with any business engaged in nuclear weapons work and in other ways constrain our nuclear capability, an essential element of this nation's defense posture and a component of our foreign policy. Such local legislation infringes on the exclusive federal war power.

Los Angeles, Minneapolis, New Orleans, Newark, Omaha, Philadelphia, Pittsburgh, St. Louis and San Francisco have adopted divestment ordinances. A number of important counties have also done so. Investor Responsibility Research Center, South Africa Review Service, *Divestment Action Roundup*, May 1989.

In addition, exclusionary procurement laws have been passed by several states, including Maryland, Massachusetts and Michigan, and many cities, including Berkeley, Chicago, Dallas, Houston, Los Angeles, New York, Newark, Oakland, Pittsburgh, Raleigh, Richmond, Rochester, Sacramento and San Francisco. Such laws prohibit companies doing business in or with South Africa from bidding on state or city contracts.

Divestment statutes and ordinances impact many public employee pension funds with combined assets amounting to over $200 billion. Investor Responsibility Research Center, South Africa Review Service, *Public Funds and South Africa-Related Divestment*. This type of legislation requires the trustees of these funds to sell the securities of many of the largest, soundest and most prominent companies in America. Divestment legislation is symptomatic of a new wave of politically based state and local legislation that intrudes on the area of foreign policy. This legislation, if unchecked by this Court, could severely restrict the federal government's ability to make and implement foreign policy.

In addition to South Africa, the issue of local encroachment on the federal government's foreign policy power arises in other situations. Twelve states have passed legislation that seeks divestment of securities of American companies doing business in Northern Ireland if they do not comply with the so-called MacBride principles.[2] These statutes seek to bring

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[2] These states are: Connecticut, Florida, Illinois, Maine, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, Rhode Island and Vermont. Northern Ireland legislation was also passed by the California legislature; however, it was vetoed by the Governor in late September. Such legislation is being considered by, among other states, Ohio and Pennsylvania.

economic pressure on the governments of Great Britain and Northern Ireland to change their domestic policies. Legislation has been proposed in the California State Assembly that would restrict state investments in United State companies that do business in or with The People's Republic of China.

Surprisingly, there has been little litigation concerning local interference with the federal foreign policy prerogative, and thus no recent opportunity for this Court to clarify the relationship between the national government and states and localities in this vital area. This case squarely presents such an opportunity.

It is well settled that, in principle, the federal government is the sole representative of the United States in dealings with foreign nations, and that the Constitution entrusts the federal government with exclusive responsibility, authority and control over the nation's foreign relations. Conversely, the authority of state and local governments in this area is, and ought to be, extremely limited. *See, e.g., United States v. Pink*, 315 U.S. 203, 233 (1942) ("There are limitations on the sovereignty of the States. No state can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared with the States; it is vested in the national government exclusively."); *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) ("Our system of government is such that the interest of the cities, counties and states . . . . imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference."); *United States v. Belmont*, 301 U.S. 324, 331 (1937) ("[I]n respect of our foreign relations generally, state lines disappear. As to such purposes the State . . . . does not exist."); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 317 (1936) ("[States] could not speak to any foreign sovereign whatever."). The Constitution expressly or by clear implication bars state or local activities that might – actually or potentially – intrude upon the exercise of federal power in this field. Thus, the states are expressly forbidden to make treaties or engage in war; they may make other "agreements or compacts" only if Congress consents. U.S. Const., Art. I,

§ 10; *see*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §201, Reporters' Note 9. States may not negotiate with other governments on matters that concern United States foreign policy. *Curtiss-Wright*, *supra*, at 316.

The vital national interest in achieving United States foreign policy objectives requires that our foreign policy be, and be perceived by other nations to be, unified and coherent, that we "speak with one voice." State and local intrusion in international issues, particularly in enacting prescriptive laws or ordinances, cannot be permitted to constrain the conduct of United States foreign relations and undermine the credibility of our positions on important international issues by giving the appearance of confusion, uncertainty, weakness or disagreement on our government's foreign policy positions.

Moreover, state or local government actions may directly impede or frustrate national foreign policy by causing injury or offense to foreign nations. It is inappropriate, and sometimes irresponsible, for state or local political organs, acting without regard for broad national policy, to take actions that could result in adverse consequences for the United States as a whole. Our history and tradition mandate that the national government – the President and Congress – elected by the people as a whole, conduct our foreign policy. State and local government officials lack the experience, information and expertise to make the circumspect and sometime subtle judgments necessary with respect to delicate foreign policy issues. State and local officials are not elected because of their foreign policy positions, nor are they responsible for the conduct of foreign policy; and certainly they do not represent a "national consensus" as to foreign policy, and are not answerable for the success or failure of such policy.

The Maryland court ignored this principle and warped constitutional law. Its holding and reasoning would sustain every local community's own preferred strategy of attempting to influence the domestic policies of South Africa, or any other global trouble spot, by its own notion of economic

leverage. The result is the approval of a theory of constitutional law that contemplates as many different "state departments" as there are cities, counties and states in the United States. That is simply not supportable and does not represent the Constitution we have.

The issue of constitutional preemption in the field of foreign affairs is driven not by the Baltimore ordinances alone, but rather by all of the similar state, city and county legislation that assumes every city, county and state has a like prerogative of deciding its own version of foreign policy vis-a-vis South Africa, Northern Ireland, China, Iran, Nicaragua, the Middle East, Eastern Europe, the Soviet Union or any other nation or region. Under the decision of the Maryland court any state or city in this country could adopt legislation that penalized American companies for doing business in any foreign nation with whose internal policies that particular state or city administration disagreed. This cannot be the state of our constitutional law.

It is not the law. This Court recognized the delicacy of the conduct of foreign policy and the importance of the federal prerogative in this field in *Zschernig v. Miller*, 389 U.S. 429 (1968). In that case (more fully discussed at pp. 25-27, *infra*), this Court held that if a local statute *may* intrude upon the federal government's exclusive foreign policy power it is unconstitutional. The strictness of that test, based on the potential, not the actuality, for conflict or inconsistency, demonstrates this Court's sensitivity, two decades ago, to the importance of having one government voice in the international arena. In this instant case, as we show below, the Ordinances not only have the potential for intruding on the federal government's foreign policy domain, they actually conflict with current United States policy as expressed in legislation enacted by Congress and signed into law and in pronouncements by the President and his foreign policy experts on United States relations with South Africa.

If the Maryland court's decision is allowed to stand and this Court does not address the overriding significant issue of who speaks for this nation in the field of foreign relations, then there is no telling how far local governments may go in

their intrusion into foreign affairs. Suppose the State of Michigan decides to ban the sale and purchase of securities of all American companies that do business in or with Japan because the Michigan legislature is angry about Japanese trade policy and alarmed by the growing sales of Japanese cars in America and wishes to send a signal to Japan. Or, the Boston City Council, traditionally heavily Irish-American in its make-up, might decide to impose a similar ban as to American companies doing business in or with Great Britain because of the latter's Northern Ireland policy. Can such actions be tolerated under the constitutional allocation of power in our federal system?

The President must be free to deal with the problems facing our nation in the world arena. Relations with South Africa cannot be conducted on a simplistic level; they require flexibility, continuous dialogue and an understanding of our global interests. Divestment legislation by local governments encroaches on the nation's ability to conduct our relations with South Africa and restrict options and the flexibility the United States must have.

We submit that local governments may not participate in the conduct of our foreign relations, for if they do so, it would mean this nation would speak with many voices, not one, in foreign affairs. This nation would revert to the days of the Articles of Confederation if the Maryland court's decision is left standing and other courts follow it. This case presents an opportunity for this Court to state clearly that local governments have no legitimate role in the articulation and implementation of our foreign policy.

B. Commerce Clause

It also cannot be the state of our constitutional law that cites and states can bar the purchase and sale of billions of dollars of securities of American issuers solely on the basis of the localities' opinion of a foreign nation in which those American securities issuers do business. The Commerce Clause of the Constitution, Art. 1, § 8 vests in Congress the power to "regulate Commerce with foreign Nations . . . ". As

interpreted by this Court that provision bars any state or local legislation which "unduly" burdens foreign commerce. And, as with the foreign relations power, this Court has repeatedly invoked the importance of this Nation "speaking with one voice" in regulating foreign commerce because of the potential for creating discord and harm to the Nation as a whole if local governments intrude upon this area. *See, e.g., Michelin Tire Corp. v. Wages*, 423 U.S.276, 285 (1976); *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434, 451, 456 (1979). The Maryland court failed to apply this principle, and failed to subject the Baltimore Ordinances to the "more rigorous" scrutiny of local legislation that implicates foreign commerce (as compared with interstate commerce) required by this Court's jurisprudence.

The Maryland court was too limited and narrow in its consideration of the question.[3] The real issue is not limited to the Baltimore Ordinances and pension plans, but comprehends divestment legislation generally. The Baltimore Ordinances and the Maryland court's decision directly affect over $400 million of securities owned by the Baltimore pension trusts in companies doing business in South Africa, but the decision has significant implications for many other public employee pension plans with over $200 billion of assets and the attempt by local governments to express by such local legislative action their opinion of the policies of several foreign countries. The decision opens the gates for massive state and local interference with our foreign commerce.

In deciding that the Ordinances did not violate the Commerce Clause, the Maryland court first invoked the "market participant" exception to the strictures of the Commerce

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[3] The Maryland court should have considered the aggregate effect of divestment legislation in the relevant commercial setting just as this Court considered the contribution of all wheat farmers, not just the plaintiff wheat farmer, in *Wickard v Filburn*, 317 U.S. 111, 127-28 (1942), in determining whether a particular statute affected interstate commerce. As this Court said: [E]ven though an individual farmer's "contribution to the demand for wheat may be trivial by itself . . . his contribution, taken together with that of many others similarly situated, is far from trivial."

Clause, asserting that Baltimore was merely buying and selling securities in the market and thereby acting in its proprietary capacity. App. D-67-75. The Maryland court cited the market participant cases of this Court, such as *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976); *White v. Mass. Council of Constr. Employers*, 460 U.S. 204 (1983) and *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980), which involved interstate commerce, and then applied the market participant doctrine to foreign commerce, ignoring the clear warning of this Court in *Reeves* that, as to foreign commerce, "it is unlikely that the market participation doctrine would be so extended." 447 U.S. at 438, n.9. The Maryland court also failed to heed *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 96 (1984), where this Court indicated that state restraints on foreign commerce are subjected to a "more rigorous" scrutiny than those affecting interstate commerce, and declined to apply the market participant theory in a case involving foreign commerce.

Moreover, the Maryland court applied the market participant theory to facts which make that theory inapposite regardless of the impact on foreign commerce. Unlike general state or city revenues that are used for public works construction projects or the purchase of goods and services by government units, the funds invested by the pension funds are not solely the property of the City of Baltimore but in significant part belong to members of the retirement plans. First, employees contribute to the pension funds; second, once the pensions are "vested", they really are the property of the employee. The effect of the Ordinances is thus "regulatory", that is they directly affect persons who have a fiduciary duty to the beneficiaries and who dispose of assets that are the property of those beneficiaries, and, as in *Wunnicke*, are not saved by the market participant exception.

This Court should decide whether the market participant theory applies to foreign commerce and whether the theory applies at all when the funds are not solely the property of the governmental entity seeking to prescribe the use of such funds.

In deciding that the Ordinances did not violate the Commerce Clause, the Maryland court also incorrectly applied the tests set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), in which this Court stated:

> "Where the statute regulates evenhandedly to effectuate a *legitimate* local public interest, and its effects on interstate commerce are only *incidental*, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question comes to one of degree. And the extent of the burden that will be tolerated, will of course depend on the nature of the local interest involved, and whether it could be promoted as well with a lesser impact on interstate activities."

Id. at 142 (emphasis added). Ignoring the relevance of *Wickard v. Filburn*, 317 U.S. 111 (1942), the Maryland court concluded that the impact of the Ordinances on interstate commerce was incidental and, even if it imposed some burden, which the Maryland court acknowledged, that burden was "not excessive in relation to the benefits." App. D-82.

First, the impact and intent of the Ordinances, and all similar divestment legislation, is direct and substantial. The pension plans subject to the Ordinances are required to sell hundreds of millions of dollars of securities of many major companies and forbidden to buy such securities. Transactions in these securities are part of interstate commerce. *Edgar v. Mite Corp.*, 457 U.S. 624, 642 (1982). Standing alone, the Ordinances have a substantial impact on interstate commerce. Indeed, the impact of the Ordinances is exclusively or primarily on interstate commerce because the securities markets are national. If the impact of all divestment legislation is considered, the substantial effect on interstate commerce is even more obvious.

Second, the Maryland court dismissed the importance of the burden on interstate commerce by asserting that the benefits of the Ordinances outweigh the burden. Its purported rationale was that the City of Baltimore enacted the Ordinances to express the City's "moral condemnation of racial discrimination." App. D-82. However salutary this expression

of moral condemnation may be, the Ordinances are not the least intrusive means of accomplishing that objective. *A & P Tea Co. v. Cottrell*, 424 U.S. 366, 372-373 (1976); *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951). A simple statement or proclamation by the City to that effect would have achieved the stated objective.

The real purpose of the Ordinances, like all such divestment legislation, however, is to regulate the activities of American companies doing business in or with South Africa and to influence the internal policies of South Africa. This purpose is not a "legitimate local public interest" within the meaning of that test as established by this Court in *Pike*. It is not "local" because it does not affect only the actions of residents of Baltimore and, indeed, is intended to have international impact. It is not "legitimate" because it intrudes on the exclusive constitutional power of the national government.

The Ordinances fail the *Pike* tests. In a real sense the result of the Ordinances and all such divestment legislation is to impose or create a secondary boycott, for the City and other local governments compel trustees of civil servant pension plans to sell all stock they own in companies which maintain economic relations with a nation deemed evil.

The Ordinances burden foreign commerce and must be annulled.

C. Taking

Amendments V and XIV to the Constitution prohibit the States (or local governments) from taking property without due process of law.

The Maryland Court of Appeals recognized that "[t]he economic impact of the Ordinances might be to deprive the beneficiaries of some variable benefits they would otherwise receive if the Ordinances were not in effect." App. D-44. The variable benefits are "property." The Maryland court further recognized that " . . . as the system continues to generate variable benefits, the amount of a beneficiary's benefits will continue to increase." App. D-3, n.3. It also found that the

ongoing cost of divestment is $1.2 million per year, plus an initial cost of $750,000, so that the first year cost is approximately $2 million. App. D-11.

Although the Maryland court recognized that in absolute terms, the costs of divestiture may be large, it erroneously concluded that "the costs are *de minimis* when viewed in relation to the systems' total assets", App. D-36, n.36, and therefore held that there was no unconstitutional "taking" caused by the Ordinances.

What the Maryland court failed to recognize is that the beneficiaries are suffering an immediate, continuous and irreparable loss as a result of the Ordinances. They contributed money to the pension funds, often over many years, and now their investment is being diminished in value and their rate of return on the variable benefits will be reduced by $1.2 million per year, compounded annually. The value of the funds' assets will be eroded by the mandate of the Ordinances and the amount of retirement income payments to the beneficiaries will be diminished.

The beneficiaries are depending on an increase in those retirement payments, not a decrease, to keep up with inflation. They depend on the income from the trust funds, including the variable benefits,[4] for their retirement. To deprive them of any portion of that income is a "taking" within the meaning of the Fifth Amendment.

Moreover, there is no proper justification for the "taking." The Ordinances do not "substantially advance" the "legitimate state interest" sought to be achieved, the standard laid down by this Court in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). The Maryland court did not inquire what legitimate local interest was advanced by

[4] Because the variable benefits portion of the retirement income payment is directly related to the rate of return and because the Ordinances mandate that the pension funds sell some of their best performing holdings (which also happen to be among the most secure equity holdings of the pension trusts) the rate of return of pension trust funds will decline. App. D-8-11.

adoption of the Ordinances and whether that interest was *substantially* advanced. The central purpose of the Ordinances, namely to condemn the racial policies of South Africa and to put economic pressure on either South Africa or American companies doing business there to bring about a change in those policies, does not advance a *legitimate* interest of Baltimore and therefore the Ordinances fail to meet the *Nollan* standard.

Instead, the Maryland court applied, *pro forma*, the three tests announced by this Court in *Connolly v. Pension Ben. Guar. Corp.*, 475 U.S. 211, 224-225 (1986) and *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978), concluding that (1) the economic impact of the Ordinances was minor; (2) they do not interfere with "distinct investment-backed expectations"; and (3) the government action was "to promote the common good by regulating its own investment policy." However, the impact of the Ordinances is not minor as they cause a substantial cost to the pension plans and a decline in retirement income to the beneficiaries; they interfere with investment expectations as the trustees may not invest in 120 of the 500 leading S&P companies; and the government action did not regulate the City's own investment policy but rather that of trustees of funds set up for the benefit of retired city employees who contributed their own money to those funds. The Ordinances are not an exercise of a city's traditional police powers. They are not to enhance the safety or welfare of the residents of Baltimore. They are a political statement intended to demonstrate Baltimore's antipathy toward the policies of South Africa.

Moreover, because the purpose of the City of Baltimore in enacting the Ordinances was, as the Maryland court wrote, "to ensure that the City's pension funds would not be invested in a manner that was morally offensive to many Baltimore

residents and many beneficiaries[5] of the pension funds," App. D-61, this Court should examine the Maryland court's decision in light of ***Armstrong* v. *United States***, 364 U.S. 40, 49 (1960), where this Court said that one of the principal purposes of the Taking Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *See also, Nollan, supra*, at 836, n.4.

Here the beneficiaries are being forced to bear the whole burden of the political statement of the City Council on behalf of the City of Baltimore vis-a-vis the government of South Africa. Under the learning of ***Armstrong, supra***, this was a "taking" and this Court should consider this case for that reason.

Furthermore, as the Maryland court recognized, the pension plans created contractual duties on the part of the City toward persons with vested rights under the plans. App. D-27-28. It further recognized that the beneficiaries had contractual rights to the variable benefits. App. D-28, n.26. However, the Maryland court erroneously concluded that the beneficiaries' contractual rights were not impaired because although the divestment costs would "diminish the level of the future variable benefits", App. D-29, the costs are so minimal that they do not "approach the constitutional standard for impairment." App. D-30.

Under the Contract Clause of the United States Constitution, Article I, § 10, the City of Baltimore cannot impair its contracts with private individuals unless it demonstrates that its action is "reasonable and necessary to serve an important public purpose." *United States Trust Company of New York v. New Jersey*, 431 U.S. 1, 25 (1977).

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[5] The four petitioner-beneficiaries have not expressed an opinion that investing in securities of companies such as General Motors, IBM and Mobil is morally offensive to them nor is there any evidence in the record that any beneficiaries shared that view.

By requiring the trustees to sell the pension funds' investments in 120 of the 500 leading S&P companies, by requiring divestment of 47% of the pension funds' equity portfolio and by causing an annual diminishment of the pension funds' earnings of $1.2 million, there was an impairment of the contract between the City and the beneficiaries.

Were the Ordinances "reasonable and necessary to serve an important public purpose?" Under *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978), the City had the burden to meet this standard. The action taken by the City that impaired the beneficiaries' contracts with the City did not advance an important public purpose nor was it reasonable or necessary, as discussed, *supra*.

This Court should reverse the Maryland court which erroneously applied Art. I, § 10 of the Constitution.

D. Preemption

Petitioners argued that the Comprehensive Anti-Apartheid Act of 1986, Pub. L. 99-440, 100 Stat. 1086 (1986), codified at 22 U.S.C. §§ 2151, 2346 (a), 5001-5116, preempted state and local divestment legislation, and that the federal government's overall policy of encouraging the presence of American business in South Africa so as to promote the economic development of all South Africans, occupied the field. The Maryland court addressed and rejected the first argument, but did not address the second.

The Maryland court was wrong in holding that the Comprehensive Anti-Apartheid Act of 1986 (the "Act") did not preempt local and state divestment legislation. The Act itself states, in Section 4:

> "The purpose of this Act is to set forth *a comprehensive and complete* framework to guide the efforts of the United States in helping to bring an end to apartheid in South Africa and lead to the establishment of a nonracial, democratic form of government. *This Act sets out United States policy toward the Government of South Africa*, the victims of apartheid, and the other states in southern Africa. It also provides the President with additional

> authority to work with the other industrial democracies to help end apartheid and establish democracy in South Africa."

(emphasis added).

The Act proscribes certain business and economic activity by American companies in and with South Africa but does not provide for divestment, even though Congress was well aware of divestment as a possible sanction when it considered the Act. Indeed, the concept of divestment was discussed and rejected. 132 Cong. Record S 11856 (Aug. 15, 1986).

The traditional preemption analysis, as most recently explicated by this Court in *California v. ARC America Corp.*, ___ U.S. ___, 109 S.Ct. 1661, 1665, 104 L.Ed.2d 86 (1989), requires a court to make three inquiries with respect to federal legislation and the state or local legislation allegedly preempted: first, has Congress expressly stated its intent to supersede state law through the enactment of the statute in question; second, even in the absence of express preemptive language, has Congress legislated so comprehensively that federal law "occupies the field," leaving no room for state regulation; third, even when Congress has not occupied the entire field, is state law nevertheless preempted because it conflicts with federal law.

In the case at bar, the second and third criteria are clearly met, and local legislation is preempted by the Act. The Act declares itself to be "comprehensive and complete." This, combined with the exclusive federal foreign relations power, occupies the field, leaving no room for local divestment legislation. *See, Pacific Gas & Electric Co. v. State Energy Resource Conservation and Development Comm'n*, 461 U.S. 190, 204 (1983). Moreover, the Ordinances "stand as an obstacle to the accomplishment and execution of the full purposes and objects of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985). In addition to declaring itself to be comprehensive and complete, the Act also explicitly gives the President (not the states or localities) "additional authority" to help end apartheid in South Africa. Clearly, Congress intended to arm the President with the

flexibility to take measured steps to bring about change in South Africa. If-Congress is not satisfied with those steps, it is for the national legislature, not each local, parochial body, to enjoin upon the President appropriate changes in United States policy.

Moreover, the customary caution with which the federal judiciary approaches preemption is not warranted here, for the conflict is not between a federal statute and a local ordinance in a field of shared federal-state authority. The Ordinances are not an exercise of "historic police powers of the State," *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), but an intrusion into an area reserved exclusively for the federal government. Thus there is no presumption against preemption, and, we submit, there should be a presumption in favor of preemption. *Cf., Hillsborough County v. Automated Medical Laboratories, Inc., supra,* at 715. Contrary to the Maryland court's statement, App. D-48, the regulation of foreign investment by residents of the locality is not an exercise of traditional police power. Indeed, it is virtually unprecedented.

Thus, the Act, by its terms, "occupies the field" and preempts state and local activity.

The second preemption theory is a corollary to the foreign policy argument. The principle is that in the area of foreign affairs the federal government occupies the field (*Hines v. Davidowitz, supra*) and here, where the federal government has established a comprehensive and complete policy which includes encouraging American business to remain in South Africa, the local legislation is preempted.[6] The Ordinances and the other local divestment legislation directly undermine the federal government's policy which encourages American companies to do business in South

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[6] Sometimes this principle is referred to as the "dormant federal foreign relations power." *See, e.g.*, Damrosch, *Foreign States and the Constitution*, 73 Va.L.Rev. 483, 507 *et. seq.* (1987).

Africa so that those companies can work to ameliorate the economic and social conditions of blacks in South Africa.[7]

In his message to Congress, Message to Congress on U.S. Actions, 21 Weekly Comp. Pres. Doc. 1054, 1055 (Sept. 16, 1985), accompanying Exec. Order No. 12532, 3 C.F.R. § 387 (1985) which imposed certain economic sanctions on South Africa, former President Reagan (echoing the language of the leading decisions of this Court construing the exclusivity of federal foreign relations competence) stated that "[i]n order for this Nation successfully to influence events in [South Africa], *it is necessary for the United States to speak with one voice* and to demonstrate our opposition to apartheid by

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[7] As Deputy Secretary of State Kenneth Dam described United States' policy in 1985:

> "Disinvestment would signal a U.S. unwillingness to pursue the only logical course of action open to us, which is attempting to promote peaceful change in South Africa. Withdrawal of U.S. business interests would remove one of the few tools of influence available to us in helping to promote change and would leave a moral void that would result in lessening of both regional U.S. influence and our ability to help influence movement away from apartheid. Disinvestment would clearly embolden [communist elements] to increase assistance to radical forces to push for the revolutionary overthrow of the South African Government. Besides this psychological and political signal, U.S. disinvestment could contribute to unemployment and unrest, with not only 70,000 workers [sic] jobs being jeopardized but the livelihood of the approximately 400,000 others who depend on them for support. This would increase the great social unrest already widespread in that country. We do not think this is what America is about."

The Anti-Apartheid Act of 1985; Hearings Before the Senate Comm. on Banking, Housing and Urban Affairs and the Senate Subcomm. on International Finance and Monetary Policy on S. 635, 99th Cong., 1st Sess., 103. *See also*, Address by Secretary of State George P. Shultz before the Business Council for International Understanding, Sept. 29, 1987, p. 16, where he stated that the Administration "strongly supports the continued presence of American business in South Africa."

taking certain actions directed specifically at key apartheid policies and agencies." (emphasis added) The mischief of local divestment legislation is that it causes the United States to speak with many voices, creating dissonance and uncertainty as to the United States policy on this important foreign relations issue. Such legislation also diminishes the ability of the national government to utilize measured actions or responses to encourage developments the United States favors without the unnecessary risk of retaliation which might affect the whole country, not just the states or cities that took the ill-advised hostile action. Diplomacy is a business of subtlety and timing, which requires finesse and coordination, not opportunistic political grandstanding or intemperate "moral outrage".

The Maryland court incorrectly ignored the argument that the federal government's foreign policy toward South Africa of encouragement of American business to participate in that country's economy preempts state and local divestment and procurement legislation which seeks to cause American companies to disengage from South Africa. In ignoring petitioners' argument the Maryland court slight^d the teachings of this Court in such cases as *Zschernig v. Miller,* 389 U.S. 429 (1968); *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973); and *Michigan Canners & Freezers Association v. Agricultural Marketing and Bargaining Board,* 467 U.S. 461 (1984).

II. The Decision Is In Conflict With An Important Decision of This Court

In *Zschernig v. Miller,* 389 U.S. 429 (1968), this Court held that an Oregon escheat statute was invalid because the state was using that law to condemn the internal policies of other nations, in particular communist countries. Even though the Ordinances and other divestment legislation likewise condemn the internal policies of South Africa, the Maryland court reached a decision that is in conflict with the reasoning of *Zschernig.*

The teaching of *Zschernig* is that if a local statute potentially intrudes upon the exclusive power of the federal government to conduct foreign policy, the statute is unconstitutional. In *Zschernig,* the federal government specifically refrained from certifying that the application of the Oregon statute unduly interfered with the United States' conduct of foreign relations. Indeed, the State Department had advised this Court that the statute had "little effect on the foreign relations and policy of this country." Memorandum for the United States at 5, cited in 80 Northwestern Law Rev. 352, n. 236. Nonetheless, because the statute had merely the "potential for disruption or embarrassment," this Court held it to be unconstitutional. The rationale of *Zschernig,* in addition to its vindication of the exclusive federal foreign policy power, was that the Oregon statute made criticism of foreign governments by states unavoidable. 389 U.S. at 441-42. Here, criticism of a foreign state is not merely a likely future event, it is an accomplished fact. Not only is there a potential intrusion on the federal foreign relations power, the intrusion is actual. Justices Stewart and Brennan, concurring in *Zschernig,* concluded, simply and directly, that the Oregon statute was unconstitutional on its face because the state legislature by passing a law that prejudiced "a nation whose policies it disapproved has trespassed upon an area where the constitution contemplates that only the National Government shall operate." 389 U.S. at 442.

The Maryland court missed the essence of *Zschernig.* It concluded that because "the effect of the Ordinances on South Africa is minimal and indirect," App. D-61, they did not interfere with the sovereign right of the federal government to conduct foreign policy.[8] The rationale of *Zschernig,* however, is that if a local government purports to sit in judgment of a

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[8] Although the trial court recognized "the exclusive Federal power to conduct foreign affairs," App. E-16, it concluded that the Ordinance did not violate that exclusive power because it had not brought "an end to apartheid." Under this reasoning, a city or state could forbid all trading with Iron Curtain countries but if those governments did not renounce communism, the legislation forbidding trade would be valid.

foreign power, the potential interference with American foreign policy is enough to create a conflict with the Constitution. The Maryland court failed to consider the real purpose of the Ordinances and other divestment legislation and the "great potential for disruption or embarrassment" (*Zschernig* at 443) which such legislation has.[9]

The Maryland court also tried to distinguish *Zschernig* by emphasizing that in *Zschernig* this Court was concerned that the Oregon courts, and courts in states with similar statutes, would engage in criticism of the nature and conduct of foreign governments. App. D-59. The rule of *Zschernig*, of course, is not limited to acts of state courts, but extends to the acts of any state government agency. The Maryland court ignored the obvious fact that the most blatant and severe sort of criticism of a foreign power lies behind divestment legislation.

One distinction between the case at bar and *Zschernig* makes this an even more compelling case for a restatement of federal foreign policy exclusivity and supremacy: in *Zschernig* there was only a potential impact on United States foreign relations; in the instant case, the Maryland court found that there is *actual* impact on our foreign relations, App. D-62; that alone requires reversal under *Zschernig* and its antecedents.

III. The Decision is in Conflict With Decisions of The Highest Courts of Other States

The decision and reasoning of the Maryland court is also in conflict with the decisions and reasoning of the highest

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[9] In avoiding the thrust of *Zschernig* the Maryland courts mistakenly relied on *Clark v. Allen*, 331 U.S. 503 (1947), in which this Court upheld a statute similar to the one at issue in *Zschernig*. In *Clark* the purpose of the statute, and therefore its potential impact, was not in issue, according to this Court's opinion in *Zschernig*. In *Zschernig* it was, as it is here. In light of the Maryland court's reliance on *Clark*, this Court should take this case to clarify and reemphasize *Zschernig* so that a clear principle is enunciated: state and local governments cannot adopt legislation that may impact on the conduct of foreign policy.

courts of New York and Illinois in analogous cases involving statutes that had as their purpose condemnation of the policies of South Africa.

In *Springfield Rare Coin Galleries, Inc. v. Johns,* 115 Ill.2d 221, 503 N.E.2d 300 (1986) the Supreme Court of Illinois struck down a statute which created an exemption from Illinois occupancy and use tax statutes for transactions in the legal tender of all nations except South Africa. The Illinois Supreme Court stated that:

> "The undisputed purposes of the exclusion are to express disapproval toward South Africa and to discourage investment in its products. We thus hold that the exclusion is an impermissible encroachment upon a national prerogative – the authority of the federal government to conduct foreign affairs."

Id., at 226.

The same analysis was undertaken by the New York State Court of Appeals in *New York Times Company v. City of New York Commission on Human Rights,* 41 N.Y.2d 345, 361 N.E.2d 963 (1977) where the court struck down the determination of the New York City Commission on Human Rights that advertisements for jobs in South Africa were discriminatory. The court recognized that the purpose of the Commission was "to impose an economic boycott aimed at the present government of the Republic of South Africa." 41 N.Y.2d at 351, 361 N.E.2d at 968. The court did not consider whether the action of the City Human Rights Commission in fact had any impact on South Africa or our conduct of foreign affairs with South Africa. The Court of Appeals stated:

> It was beyond the ken of the City Commission on Human Rights to enforce local antidiscrimination laws by imposing an economic boycott of the Republic of South Africa. In this very case, the commission conducted an inquiry that might have been considered offensive by the Republic of South Africa and which might have been an embarrassment to those charged with the conduct of our Nation's foreign policy. The true danger is that if New York City could do this in one instance, it could do so in many instances. Each locality in each

> State may not adopt its own foreign policy. This would be disastrous, not only because of multiplicity and divergence of policies, but because local decisions are often influenced by pragmatic local considerations which are not necessarily controlling or even relevant to national policy as determined by the Federal Government at Washington.

Id., 41 N.Y.2d at 353, 361 N.E.2d at 969.

The Baltimore Ordinances at issue in this case are likewise a potential embarrassment to those charged with the conduct of foreign relations, and were motivated by local, parochial, political considerations which diverge from those controlling the foreign policy of the United States.

The Maryland Court of Appeals sought to distinguish *Springfield Rare Coin Galleries* and *New York Times Co.* by asserting that "although the Ordinances might be viewed as having some tangential effect on economic relations between American firms and South African businesses or government, their impact on foreign affairs is far smaller than New York City's action . . . or that of Illinois . . . ." App. D-65. Not only is the statement incorrect in view of the massive impact of all local divestment legislation, or even the divestment caused to the Baltimore pension funds alone of $400 million in stock, but it is unsupported in the record. Moreover, implicit is recognition by the Maryland court that the Ordinances have *actual* impact on this nation's foreign relations; this concession alone is sufficient to warrant review and reversal under *Zschernig*.

CONCLUSION

The decision of the Maryland Court of Appeals incorrectly addresses several critical issues of national importance: the intrusion of local governments in the conduct and articulation of this nation's foreign policy; whether local governments may bar the purchase and sale of billions of dollars of securities under the Commerce Clause; the application of the market participant doctrine to foreign commerce and to the use of funds partly the property of the beneficiaries, not the city; whether the reduction of the value of public pension trust funds to satisfy the political and moral desires of local governments works a taking of the property of the beneficiaries of those funds or is an impairment of the contracts between the city and the beneficiaries; and preemption in the areas of foreign relations and foreign commerce by the federal government of local divestment legislation. Review by this Court is necessary.

Petitioners respectfully urge this Court to grant this petition for writ of certiorari and reverse the decision and judgment of the Maryland Court of Appeals.

Dated: November 30, 1989

Respectfully submitted,

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APPENDIX A

UNITED STATES CONSTITUTION

Article I

Section 8. . . .The Congress shall have Power. . . .To regulate Commerce with foreign Nations, and among the several States. . . .

Section 10. No State shall enter into any Treaty, Alliance, or Confederation; . . . pass any . . . Law impairing the Obligation of Contracts. . . .

No State shall, without the Consent of Congress . . . . enter into any Agreement or Compact with . . . a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Article II

Section 2. The President . . . . shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors . . . .

Article VI

. . . . This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding . . . .

Amendment V

No person shall. . . .be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV

Section 1. . . . .No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX B

PUBLIC LAW 99-440 [H.R. 4868]: October 2, 1986

COMPREHENSIVE ANTI-APARTHEID ACT OF 1986

For Legislative History of Act see Report for P.L. 99-440 in Legislative History Section, post.

An Act to prohibit loans to, other investments in, and certain other activities with respect to, South Africa, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This Act may be cited as the "Comprehensive Anti-Apartheid Act of 1986".

TABLE OF CONTENTS

SEC. 2. The table of contents of this Act is as follows:

TITLE II – MEASURES TO ASSIST VICTIMS OF APARTHEID

TITLE III – MEASURES BY THE UNITED STATES TO UNDERMINE APARTHEID

TITLE IV – MULTILATERAL MEASURES TO UNDERMINE APARTHEID

TITLE V – FUTURE POLICY TOWARD SOUTH AFRICA

TITLE VI – ENFORCEMENT AND ADMINISTRATIVE PROVISIONS

DEFINITIONS

SEC. 3. As used in this Act –

(1) the term "Code of Conduct" refers to the principles set forth in section 208(a);

(2) the term "controlled South African entity" means –

(A) a corporation, partnership, or other business association or entity organized in South Africa and owned or controlled, directly or indirectly, by a national of the United States; or

(B) a branch, office, agency, or sole proprietorship in South Africa of a national of the United States;

(3) the term "loan" –

(A) means any transfer or extension of funds or credit on the basis of an obligation to repay, or any assumption or guarantee of the obligation of another to repay an extension of funds or credit, including –

(i) overdrafts,
(ii) currency swaps,
(iii) the purchase of debt or equity securities issued by the Government of South Africa or a South African entity on or after the date of enactment of this Act,
(iv) the purchase of a loan made by another person,
(v) the sale of financial assets subject to an agreement to repurchase, and

(vi) a renewal or refinancing whereby funds or credits are transferred or extended to the Government of South Africa or a South African entity, and

(B) does not include –

(i) normal short-term trade financing, as by letters of credit or similar trade credits;

(ii) sales on open account in cases where such sales are normal business practice; or

(iii) rescheduling of existing loans, if no new funds or credits are thereby extended to a South African entity or the Government of South Africa;

(4) the term "new investment" –

(A) means –

(i) a commitment or contribution of funds or other assets, and

(ii) a loan or other extension of credit, and

(B) does not include –

(i) the reinvestment of profits generated by a controlled South African entity into that same controlled South African entity or the investment of such profits in a South African entity;

(ii) contributions of money or other assets where such contributions are necessary to enable a controlled South African entity to operate in an economically sound manner, without expanding its operations; or

(iii) the ownership or control of a share or interest in a South African

entity or a controlled South African entity or a debt or equity security issued by the Government of South Africa or a South African entity before the date of enactment of this Act, or the transfer or acquisition of such a share, interest, or debt or equity security, if any such transfer or acquisition does not result in a payment, contribution of funds or assets, or credit to a South African entity, a controlled South African entity, or the Government of South Africa;

(5) the term "national of the United States" means –

(A) a natural person who is a citizen of the United States or who owes permanent allegiance to the United States or is an alien lawfully admitted for permanent residence in the United States, as define by section 101(a) (20) of the Immigration and Nationality Act (8 U.S.C. 1101(a) (20)); or

(B) a corporation, partnership, or other business association which is organized under the laws of the United States, any State or territory thereof, or the District of Columbia;

(6) the term "South Africa" includes –

(A) the Republic of South Africa;

(B) any territory under the Administration, legal or illegal, of South Africa; and

(C) the "bantustans" or "homelands", to which South African blacks are assigned on the basis of ethnic origin, including the Transkei, Bophuthatswana, Ciskei, and Venda; and

(7) the term "South African entity" means –

(A) a corporation, partnership, or other business association or entity organized in South Africa; or

(B) a branch, office, agency, or sole proprietorship in South Africa of a person that resides or is organized outside South Africa; and

(8) the term "United States" includes the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

PURPOSE

SEC. 4. The purpose of this Act is to set forth a comprehensive and complete framework to guide the efforts of the United States in helping to bring an end to apartheid in South Africa and lead to the establishment of a nonracial, democratic form of government. This Act sets out United States policy toward the Government of South Africa, the victims of apartheid, and the other states in southern Africa. It also provides the President with additional authority to work with the other industrial democracies to help end apartheid and establish democracy in South Africa.

TITLE I – POLICY OF THE UNITED STATES WITH RESPECT TO ENDING APARTHEID

POLICY TOWARD THE GOVERNMENT OF SOUTH AFRICA

SEC. 101. (a) United States policy toward the Government of South Africa shall be designed to bring about reforms in that system of government that will lead to the establishment of a nonracial democracy.

(b) The United States will work toward this goal by encouraging the Government of South Africa to –

(1) repeal the present state of emergency and respect the principle of equal justice under law for citizens of all races;

(2) release Nelson Mandela, Govan Mbeki, Walter Sisulu, black trade union leaders, and all political prisoners;

(3) permit the free exercise by South Africans of all races of the right to form political parties, express political opinions, and otherwise participate in the political process;

(4) establish a timetable for the elimination of apartheid laws;

(5) negotiate with representatives of all racial groups in South Africa the future political system in South Africa; and

(6) end military and paramilitary activities aimed at neighboring states.

(c) The United States will encourage the actions set forth in subsection (b) through economic, political, and diplomatic measures as set forth in this Act. The United States will adjust its actions towards the Government of South Africa to reflect the progress of lack of progress

made by the Government of South Africa in meeting the goal set forth in subsection (a).

POLICY TOWARD THE AFRICAN NATIONAL CONGRESS,ETC.

SEC. 102 (a) United States policy toward the African National Congress, the Pan African Congress, and their affiliates shall be designed to bring about a suspension of violence that will lead to the start of negotiations designed to bring about a nonracial and genuine democracy in South Africa.

(b) The United States shall work toward this goal by encouraging the African National Congress and the Pan African Congress, and their affiliates, to –

(1) suspend terrorist activities so that negotiations with the Government of South Africa and other groups representing black South Africans will be possible;

(2) make known their commitment to a free and democratic post-apartheid South Africa;

(3) agree to enter into negotiations with the South African Government and other groups representing black South Africans for the peaceful solution of the problems of South Africa;

(4) reexamine their ties to the South African Communist Party.

(c) The United States will encourage the actions set forth in subsection (b) through political and diplomatic measures. The United States will adjust its actions toward the Government of South Africa not only to reflect progress or lack of progress made by the Government of

South Africa in meeting the goal set forth in subsection 101 (a) but also to reflect progress or lack of progress made by the ANC and other organizations in meeting the goal set forth in subsection (a) of this section.

POLICY TOWARD THE VICTIMS OF APARTHEID

SEC. 103. (a) The United States policy toward the victims of apartheid is to use economic, political, diplomatic, and other effective means to achieve the removal of the root cause of their victimization, which is the apartheid system. In anticipation of the removal of the system of apartheid and as a further means of challenging that system, it is the policy of the United States to assist these victims of apartheid as individuals and through organizations to overcome the handicaps imposed on them by the system of apartheid and to help prepare them for their rightful roles as full participants in the political, social, economic, and intellectual life of their country in the post-apartheid South Africa envisioned by this Act.

(b) The United States will work toward the purposes of subsection (a) by –

(1) providing assistance to South African victims of apartheid without discrimination by race, color, sex, religious belief, or political orientation, to take advantage of educational opportunities in South Africa and in the United States to prepare for leadership positions in a post-apartheid South Africa;

(2) assisting victims of apartheid;

(3) aiding individuals or groups in South Africa whose goals are to aid victims of apartheid or foster nonviolent legal or political challenges to the apartheid laws;

(4) furnishing direct financial assistance to those whose non-violent activities had led to their arrest or detention by the South African authorities and (B) to the families of those killed by terrorist acts such as "necklacings";

(5) intervening at the highest political levels in South Africa to express the strong desire of the United States to see the development in South Africa of a nonracial democratic society;

(6) Supporting the rights of the victims of apartheid through political, economic, or other sanctions in the event the Government of South Africa fails to make progress toward the removal of the apartheid laws and the establishment of such democracy; and

(7) supporting the rights of all Africans to be free of terrorist attacks by setting a time limit after which the United States will pursue diplomatic and political measures against those promoting terrorism and against those countries harboring such groups so as to achieve the objectives of this Act.

POLICY TOWARD OTHER COUNTRIES IN SOUTHERN AFRICA

SEC. 104. (a) The United States policy toward the other countries in the Southern African region shall be designed to encourage democratic forms of government full respect for human rights, an end to cross-border terrorism, political independence, and economic development.

(b) The United States will work toward the purposes of subsection (a) by –

(1) helping to secure the independence of Namibia and the establishment of Namibia as a nonracial democracy in accordance with appropriate United Nations Security Council resolutions;

(2) supporting the removal of all foreign military forces from the region;

(3) encouraging the nations of the region to settle differences through peaceful means;

(4) promoting economic development through bilateral and multilateral economic assistance targeted at increasing opportunities in the productive sectors of national economies, with a particular emphasis on increasing opportunities for non-governmental economic activities;

(5) encouraging, and when necessary, strongly demanding, that all countries of the region respect the human rights of their citizens and noncitizens residing in the country, and especially the release of persons persecuted for their political beliefs or detained without trial;

(6) encouraging, and when necessary, strongly demanding that all countries of the region take effective action to end cross-border terrorism; and

(7) providing appropriate assistance, within the limitations of American responsibilities at home and in other regions, to assist regional economic cooperation and the development of interregional transportation and other capital facilities necessary for economic growth.

POLICY TOWARD "FRONTLINE" STATES

SEC. 105. It is the sense of the Congress that the President should discuss with the governments of the African "frontline" states the effects on them of disruptions in transportation or other economic links through South Africa and of means of reducing those effects.

POLICY TOWARD A NEGOTIATED SETTLEMENT

SEC. 106. (a) (1) United States policy will seek to promote negotiations among representatives of all citizens of South Africa to determine a future political system that would permit all citizens to be full participants in the governance of their country. The United States recognizes that important and legitimate political parties in South Africa include several organizations that have been banned and will work for the unbanning of such organizations in order to permit legitimate political viewpoints to be represented at such negotiations. The United States also recognizes that some of the organizations fighting apartheid have become infiltrated by Communists and that Communists serve on the governing boards of such organizations.

(2) To this end, it is the sense of the Congress that the President, the Secretary of State, or other appropriate high-level United States officials should meet with the leaders of opposition organizations of South Africa, particularly but not limited to those organizations representing the black majority. Furthermore, the President, in concert with the major allies of the United States and other interested parties, should seek to bring together

opposition political leaders with leaders of the Government of South Africa for the purpose of negotiations to achieve a transition to the post-apartheid democracy envisioned in this Act.

(b) The United States will encourage the Government of South Africa and all participants to the negotiations to respect the right of all South Africans to form political parties, express political opinions, and otherwise participate in the political process without fear of retribution by either governmental or nongovernmental organizations. It is the sense of the Congress that a suspension of violence is an essential precondition for the holding of negotiations. The United States calls upon all parties to the conflict to agree to a suspension of violence.

(c) The United States will work toward the achievement of agreement to suspend violence and begin negotiations through coordinated actions with the major Western allies and with the governments of the countries in the region.

(d) It is the sense of the Congress that the achievement of an agreement for negotiations could be promoted if the United States and its major allies, such as Great Britain, Canada, France, Italy, Japan, and West Germany, would hold a meeting to develop a four-point plan to discuss with the Government of South Africa a proposal for stages of multilateral assistance to South Africa in return for the Government of South Africa implementing –

(1) an end to the state of emergency and the release of the political prisoners, including Nelson Mandela;

(2) the unbanning of the African National Congress, the Pan African Congress, the Black Consciousness Movement, and all other groups willing to suspend terrorism and to participate in negotiations and a democratic process;

(3) a revocation of the Group Areas Act and the Population Registration Act and the granting of universal citizenship to all South Africans, including homeland residents; and

(4) the use of the international offices of a third party as an intermediary to bring about negotiations with the object of the establishment of power-sharing with the black majority.

POLICY TOWARD INTERNATIONAL COOPERATION ON MEASURES TO END APARTHEID

SEC. 107. (a) The Congress finds that –

(1) international cooperation is a prerequisite to an effective anti-apartheid policy and to the suspension of terrorism in South Africa; and

(2) The situation in South Africa constitutes an emergency in international relations and that action is necessary for the protection of the essential security interests of the United States.

(b) Accordingly, the Congress urges the President to seek such cooperation among all individuals, groups, and nations.

POLICY TOWARD NECKLACING

SEC. 108. It is the sense of the Congress that the African National Congress should strongly condemn and

take effective actions against the execution by fire, commonly known as "necklacing", of any person in any country.

UNITED STATES AMBASSADOR TO MEET WITH NELSON MANDELA

SEC. 109. It is the sense of the Senate that the United States Ambassador should promptly make a formal request to the South African Government for the United States Ambassador to meet with Nelson Mandela.

POLICY TOWARD THE RECRUITMENT AND TRAINING OF BLACK SOUTH AFRICANS BY UNITED STATES EMPLOYERS

SEC. 110. (a) The Congress finds that –

(1) the policy of apartheid is abhorrent and morally repugnant;

(2) the United States believes strongly in the principles of democracy and individual freedoms;

(3) the United States endorses the policy of political participation of all citizens;

(4) a free, open, and vital economy is a primary means for achieving social equality and economic advancement for all citizens; and

(5) the United States is committed to a policy of securing and enhancing human rights and individual dignity throughout the world.

(b) It is the sense of the Congress that United States employers operating in South Africa are obliged both generally to actively oppose the policy and practices of apartheid and specifically to engage in recruitment and

training of black and colored South Africans for management responsibilities.

TITLE II - MEASURES TO ASSIST VICTIMS OF APARTHEID

SCHOLARSHIPS FOR THE VICTIMS OF APARTHEID

SEC. 201. (a) Section 105 (b) of the Foreign Assistance Act of 1961 is amended -

(1) by inserting "(1)" after "(b)"; and

(2) by adding at the end thereof the following new paragraph:

"(2) (A) (i) Of the amounts authorized to be appropriated to carry out this section for the fiscal years 1987, 1988, and 1989, not less than $4,000,000 shall be used in each such fiscal year to finance education, training, and scholarships for the victims of apartheid, including teachers and other educational professionals, who are attending universities and colleges in South Africa. Amounts available to carry out this subparagraph shall be provided in accordance with the provision of section 802 (c) of the International Security and Development Cooperation Act of 1985.

"(ii) Funds made available for each such fiscal year for purposes of chapter 4 of part II of this Act may be used to finance such education, training, and scholarships in lieu of an equal amount made available under this subparagraph.

"(B) (i) In addition to amounts used for purposes of subparagraph (A), the agency primarily responsible for administering this part, in collaboration with other

appropriate departments or agencies of the United States, shall use assistance provided under this section or chapter 4 of part II of this Act to finance scholarships for students pursuing secondary school education in South Africa. The selection of scholarship recipients shall be by a nationwide panel or by regional panels appointed by the United States chief of diplomatic mission to South Africa.

"(ii) Of the amounts authorized to be appropriated to carry out this section and chapter 4 of part II of this Act for the fiscal years 1987, 1988, and 1989, up to an aggregate of $1,000,000 may be used in each such fiscal year for purposes of this subparagraph.

"(C) (i) In addition to the assistance authorized in subparagraph (A), the agency primarily responsible for administering this part shall provide assistance for inservice teacher training programs in South Africa through such nongovernmental organizations as TOPS or teachers' unions.

"(ii) Of the amounts authorized to be appropriated to carry out this section and chapter 4 of part II of this Act, up to an aggregate of $500,000 for the fiscal year 1987 and up to an aggregate of $1,000,000 for the fiscal year 1988 may be used for purposes of this subparagraph, subject to standard procedures for project review and approval.".

(b) The Foreign Assistance Act of 1961 is amended by inserting after section 116 the following new section:

"SEC. 117. ASSISTANCE FOR DISADVANTAGED SOUTH AFRICANS. . In providing assistance under this chapter or

under chapter 4 of part II of this Act for disadvantaged South Africans, priority shall be given to working with and through South African nongovernmental organizations whose leadership and staff are selected on a nonracial basis, and which have the support of the disadvantaged communities being served. The measure of this community support shall be the willingness of a substantial number of disadvantaged persons to participate in activities sponsored by these organizations. Such organizations to which such assistance may be provided include the Educational Opportunities Council, the South African Institute of Race Relations, READ, professional teachers' unions, the Outreach Program of the University of the Western Cape, the Funda Center in Soweto, SACHED, UPP Trust, TOPS, the Wilgespruit Fellowship Center (WFC), and civic and other organizations working at the community level which do not receive funds from the Government of South Africa.".

HUMAN RIGHTS FUND

SEC. 202. (a) Section 116 (e) (2) (A) of the Foreign Assistance Act of 1961 is amended –

(1) by striking out "1984 and" and inserting in lieu thereof "1984,"; and

(2) by inserting after "1985" a comma and the following: "and $1,500,000 for the fiscal year 1986 and for each fiscal year thereafter".

(b) Section 116 of such Act is amended by adding at the end thereof the following new subsection:

"(f) (1) Of the funds made available to carry out subsection (e) (2) (A) for each fiscal year, not less than

$500,000 shall be used for direct legal and other assistance to political detainees and prisoners and their families, including the investigation of the killing of protesters and prisoners, and for support for actions of black-led community organizations to resist, through nonviolent means, the enforcement of apartheid policies such as —

"(A) removal of black populations from certain geographic areas on account of race or ethnic origin,

"(B) denationalization of blacks, including any distinctions between the South African citizenships of blacks and whites,

"(C) residence restrictions based on race or ethnic origin,

"(D) restrictions on the rights of blacks to seek employment in South Africa and to live wherever they find employment in South Africa, and

"(E) restrictions which made it impossible for black employees and their families to be housed in family accommodations near their place of employment.

"(2) (A) No grant under this subsection may exceed $100,000.

"(B) The average of all grants under this paragraph made in any fiscal year shall not exceed $70,000.

"(g) Of the funds made available to carry out subsection (e) (2) (A) for each fiscal year, $175,000 shall be used for direct assistance to families of victims of violence such as 'necklacing' and other such inhumane acts.

An additional $175,000 shall be made available to black groups in South Africa which actively working toward a multi-racial solution to the sharing of political power in that country through nonviolent, constructive means.".

EXPANDING PARTICIPATION IN THE SOUTH AFRICAN ECONOMY

SEC. 203. (a) The Congress declares that –

(1) the denial under the apartheid laws of South Africa of the rights of South African blacks and other nonwhites to have the opportunity to participate equitably in the South African economy as managers or owners of, or professionals in, business enterprises, and

(2) the policy of confining South African blacks and other nonwhites to the status of employees in minority-dominated businesses,

is an affront to the values of a free society.

(b) The Congress hereby –

(1) applauds the commitment of nationals of the United States adhering to the Code of Conduct to assure that South African blacks and other nonwhites are given assistance in gaining their rightful place in the South African economy; and

(2) urges the United States Government to assist in appropriate ways the realization by South African blacks and other nonwhites of their rightful place in the South African economy.

(c) Notwithstanding any other provision of law, the Secretary of State and any other head of a department or agency of the United States carrying out activities in

South Africa shall, to the maximum extent practicable, in procuring goods or services, make affirmative efforts to assist business enterprises having more than 50 percent beneficial ownership by South African blacks or other nonwhite South Africans.

EXPORT-IMPORT BANK OF THE UNITED STATES

SEC. 204. Section 2 (b) (9) of the Export-Import Bank Act of 1945 is amended –

(1) by striking out "(9) In" and inserting in lieu thereof "(9) (A) Except as provided in subparagraph (B), in"; and

(2) by adding at the end thereof the following:

"(B) The Bank shall take active steps to encourage the use of its facilities to guarantee, insure, extend credit, or participate in the extension of credit to business enterprises in South Africa that are majority owned by South African blacks or other nonwhite South Africans. The certification requirement contained in clause (c) of subparagraph (A) shall not apply to exports to or purchases from business enterprises which are majority owned by South African blacks or other nonwhite South Africans.".

LABOR PRACTICES OF THE UNITED STATES GOVERNMENT IN SOUTH AFRICA

SEC. 205. (a) It is the sense of the Congress that the labor practices used by the United States Government –

(1) for the direct hire of South Africans,

(2) for the reimbursement out of official residence funds of South Africans and

employees of South African organizations for their long-term employment services on behalf of the United States Government, and

(3) for the employment services of South Africans arranged by contract,

should represent the best of labor practices in the United States and should serve as a model for the labor practices of nationals of the United States in South Africa.

(b) The Secretary of State and any other head of a department or agency of the United States carrying out activities in South Africa shall promptly take, without regard to any provision of law, the necessary steps to ensure that the labor practices applied to the employment services described in paragraphs (1) through (3) of subsection (a) are governed by the Code of Conduct. Nothing in this section shall be construed to grant any employee of the United States the right to strike.

WELFARE AND PROTECTION OF VICTIMS OF APARTHEID BY THE UNITED STATES

SEC. 206. (a) The Secretary of State shall acquire, through lease or purchase, residential properties in the Republic of South Africa that shall be made available, at rents that are equitable, to assist victims of apartheid who are employees of the United States Government in obtaining adequate housing. Such properties shall be acquired only in neighborhoods which would be open to occupancy by other employees of the United States Government in South Africa.

(b) There are authorized to be appropriated $10,000,000 for the fiscal year 1987 to carry out the purposes of this section.

EMPLOYMENT PRACTICES OF UNITED STATES NATIONALS IN SOUTH AFRICA

SEC. 207. (a) Any national of the United States that employs more than 25 persons in South Africa shall take the necessary steps to insure that the Code of Conduct is implemented.

(b) No department or agency of the United States may intercede with any foreign government or foreign national, regarding the export marketing activities in any country of any national of the United States employing more than 25 persons in South Africa that is not implementing the Code of Conduct.

CODE OF CONDUCT

SEC. 208. (a) The Code of Conduct referred to in sections 203, 205, 207, and 603 of this Act is as follows:

(1) desegregating the races in each employment facility;

(2) providing equal employment opportunity for all employees without regard to race or ethnic origin;

(3) assuring that the pay system is applied to all employees without regard to race or ethnic origin;

(4) establishing a minimum wage and salary structure based on the appropriate local minimum economic level which takes into account the needs of employees and their families;

(5) increasing by appropriate means the number of persons in managerial, supervisory,

administrative, clerical, and technical jobs who are disadvantaged by the apartheid system for the purpose of significantly increasing their representation in such jobs;

(6) taking reasonable steps to improve the quality of employees' lives outside the work environment with respect to housing, transportation, schooling, recreation, and health; and

(7) implementing fair labor practices by recognizing the right of all employees, regardless of racial or other distinctions, to self-organization and to form, join, or assist labor organizations, freely and without penalty or reprisal, and recognizing the right to refrain from any such activity.

(b) It is the sense of the Congress that in addition to the principles enumerated in subsection (a), nationals of the United States subject to section 207 should seek to comply with the following principle: taking reasonable measures to extend the scope of influence on activities outside the workplace, including –

(1) supporting the unrestricted rights of black businesses to locate in urban areas;

(2) influencing other companies in South Africa to follow the standards of equal rights principles;

(3) supporting the freedom of mobility of black workers to seek employment opportunities wherever they exist, and make provision for adequate housing for families of employees within the proximity of workers' employment; and

(4) supporting the rescission of all apartheid laws.

(c) The President may issue additional guidelines and criteria to assist persons who are or may be subject to section 207 in complying with the principles set forth in subsection (a) of this section. The President may, upon request, give an advisory opinion to any person who is or may be subject to this section as to whether that person is subject to this section or would be considered to be in compliance with the principles set forth in subsection (a).

(d) The President may require all nationals of the United States referred to in section 207 to register with the United States Government.

(e) Notwithstanding any other provision of law, the President may enter into contracts with one or more private organizations or individuals to assist in implementing this section.

PROHIBITION ON ASSISTANCE

SEC. 209. No assistance may be provided under this Act to any group which maintains within its ranks any individual who has been found to engage in gross violations of internationally recognized human rights (as defined in section 502B (d) (1) of the Foreign Assistance Act of 1961).

USE OF THE AFRICAN EMERGENCY RESERVE

SEC. 210. Whenever the President determines that such action is necessary or appropriate to meet food shortages in southern Africa, the President is authorized to utilize the existing, authorized, and funded reserve entitled the "Emergency Reserve for African Famine

Relief" to provide food assistance and transportation for that assistance.

PROHIBITION ON ASSISTANCE TO ANY PERSON OR GROUP ENGAGING IN "NECKLACING"

SEC. 211. No assistance may be provided under this Act, the Foreign Assistance Act of 1961, or any other provision of law to any individual, group, organization, or member thereof, or entity that directly or indirectly engages in, advocates, supports, or approves the practice of execution by fire, commonly known as "necklacing".

PARTICIPATION OF SOUTH AFRICA IN AGRICULTURAL EXPORT CREDIT AND PROMOTION PROGRAMS

SEC. 212. Notwithstanding any other provision of this Act or any other provision of law, the Secretary of Agriculture may permit South Africa to participate in agricultural export credit and promotion programs conducted by the Secretary at similar levels, and under similar terms and conditions, as other countries that have traditionally purchased United States agricultural commodities and the products thereof.

TITLE III – MEASURES BY THE UNITED STATES TO UNDERMINE APARTHEID

PROHIBITION ON THE IMPORTATION OF KRUGERRANDS

SEC. 301. No person, including a bank, may import into the United States any South African krugerrand or any other gold coin minted in South Africa or offered for sale by the Government of South Africa.

PROHIBITION ON THE IMPORTATION
OF MILITARY ARTICLES

SEC. 302. No arms, ammunition, or military vehicles produced in South Africa or any manufacturing data for such articles may be imported into the United States.

PROHIBITION ON THE IMPORTATION OF PRODUCTS
FROM PARASTATAL ORGANIZATIONS

SEC. 303. (a) Notwithstanding any other provision of law, no article which is grown, produced, manufactured by, marketed, or otherwise exported by a parastatal organization of South Africa may be imported into the United States, (1) except for agricultural products during the 12-month period from the date of enactment; and (2) except for those strategic minerals for which the President has certified to the Congress that the quantities essential for the economy or defense of the United States are unavailable from reliable and secure suppliers and except for any article to be imported pursuant to a contract entered into before August 15, 1986: *Provided,* That no shipments may be received by a national of the United States under such contract after April 1, 1987.

(b) For purposes of this section, the term "parastatal organization" means a corporation or partnership owned or controlled or subsidized by the Government of South Africa, but does not mean a corporation or partnership which previously received start-up assistance from the South African Industrial Development Corporation but which is now privately owned.

PROHIBITION ON COMPUTER EXPORTS TO SOUTH AFRICA

SEC. 304. (a) No computers, computer software, or goods or technology intended to manufacture or service computers may be exported to or for use by any of the following entities of the Government of South Africa;

(1) The military.

(2) The police.

(3) The prison system.

(4) The national security agencies.

(5) ARMSCOR and its subsidiaries or the weapons research activities of the Council for Scientific and Industrial Research.

(6) The administering authorities for controlling the movements of the victims of apartheid.

(7) Any apartheid enforcing agency.

(8) Any local, regional, or homelands government entity which performs any function of any entity described in paragraphs (1) through (7).

(b) (1) Computers, computer software, and goods or technology intended to service computers may be exported, directly or indirectly, to or for use by an entity of the Government of South Africa other than those set forth in subsection (a) only if a system of end use verification is in effect to ensure that the computers involved will not be used for any function of any entity set forth in subsection (a).

(2) The Secretary of Commerce may prescribe such rules and regulations as may be necessary to carry out this section.

PROHIBITION ON LOANS TO THE GOVERNMENT OF SOUTH AFRICA

Sec. 305. (a) No national of the United States may make or approve any loan or other extension of credit, directly or indirectly, to the Government of South Africa or to any corporation, partnership or other organization which is owned or controlled by the Government of South Africa.

(b) The prohibition contained in subsection (a) shall not apply to –

(1) a loan or extension of credit for any education, housing, or humanitarian benefit which –

(A) is available to all persons on a nondiscriminatory basis; or

(B) is available in a geographic area accessible to all population groups without any legal or administrative restriction; or

(2) a loan or extension of credit for which an agreement is entered into before the date of enactment of this Act.

PROHIBITION ON AIR TRANSPORTATION WITH SOUTH AFRICA

Sec. 306. (a) (1) The President shall immediately notify the Government of South Africa of his intention to suspend the rights of any air carrier designated by the Government of South Africa under the Agreement

Between the Government of the United States of America and the Government of the Union of South Africa Relating to Air Services Between Their Respective Territories, signed May 23, 1947, to service the routes provided in the Agreement.

(2) Ten days after the date of enactment of this Act, the President shall direct the Secretary of Transportation to revoke the right of any air carrier designated by the Government of South Africa under the Agreement to provide service pursuant to the Agreement.

(3) Ten days after the date of enactment of this Act, the President shall direct the Secretary of Transportation not to permit or otherwise designate any United States air carrier to provide service between the United States and South Africa pursuant to the Agreement.

(b) (1) The Secretary of State shall terminate the Agreement Between the Government of the United States of America and the Government of the Union of South Africa Relating to Air Services Between Their Respective Territories, signed May 23, 1947, in accordance with the provisions of that agreement.

(2) Upon termination of such agreement, the Secretary of Transportation shall prohibit any aircraft of a foreign air carrier owned, directly or indirectly, by the Government of South Africa or by South African nationals from engaging in air transportation with respect to the United States.

(3) The Secretary of Transportation shall prohibit the takeoff and landing in South Africa of any aircraft by an air carrier owned, directly or indirectly, or controlled

by a national of the United States or by any corporation or other entity organized under the laws of the United States or of any State.

(c) The Secretary of Transportation may provide for such exceptions from the prohibition contained in subsection (a) or (b) as the Secretary considers necessary to provide for emergencies in which the safety of an aircraft or its crew or passengers is threatened.

(d) For purposes of this section, the terms "aircraft", "air transportation", and "foreign air carrier" have the meanings given those terms in section 101 of the Federal Aviation Act of 1958 (49 U.S.C. 1301).

PROHIBITIONS ON NUCLEAR TRADE
WITH SOUTH AFRICA

SEC. 307. (a) Notwithstanding any other provision of law –

(1) the Nuclear Regulatory Commission shall not issue any license for the export to South Africa of production or utilization facilities, any source or special nuclear material or sensitive nuclear technology, or any component parts, items, or substances which the Commission has determined, pursuant to section 109b. of the Atomic Energy Act, to be especially relevant from the standpoint of export control because of their significance for nuclear explosive purposes;

(2) the Secretary of Commerce shall not issue any license for the export to South Africa of any goods or technology which have been determined, pursuant to section 309 (c) of the Nuclear Non-Proliferation Act of 1978, to be of significance for nuclear explosive purposes for

use in, or judged by the President to be likely to be diverted to, a South African production or utilization facility;

(3) the Secretary of Energy shall not, under section 57b. (2) of the Atomic Energy Act, authorize any person to engage, directly or indirectly, in the production of special nuclear material in South Africa; and

(4) no goods, technology, source or special nuclear material, facilities, components, items, or substances referred to in clauses (1) through (3) shall be approved by the Nuclear Regulatory Commission or an executive branch agency for retransfer to South Africa,

unless the Secretary of State determines and certifies to the Speaker of the House of Representatives and the chairman of the Committee on Foreign Relations of the Senate that the Government of South Africa is a party to the Treaty on the Non-Proliferation of Nuclear Weapons, done at Washington, London, and Moscow on July 1, 1968, or otherwise maintains International Atomic Energy Agency safeguards on all its peaceful nuclear activities, as defined in the Nuclear Non-Proliferation Act of 1978.

(b) Nothing in this section shall preclude –

(1) any export, retransfer, or activity generally licensed or generally authorized by the Nuclear Regulatory Commission or the Department of Commerce or the Department of Energy; or

(2) assistance for the purpose of developing of applying International Atomic Energy Agency or United States bilateral safeguards, for International Atomic Energy Agency programs generally available to its member states, for reducing the use of highly enriched uranium in

research or test reactors, or for other technical programs for the purpose of reducing proliferation risks, such as programs to extend the life of reactor fuel and activities envisaged by section 223 of the Nuclear Waste Policy Act of 1982 or which are necessary for humanitarian reasons to protect the public health and safety.

(c) The prohibitions contained in subsection (a) shall not apply with respect to a particular export, retransfer, or activity, or a group of exports, retransfers, or activities, if the President determines that to apply the prohibitions would be seriously prejudicial to the achievement of United States nonproliferation objectives or would otherwise jeopardize the common defense and security of the United States and, if at least 60 days before the initial export, retransfer, or activity is carried out, the President submits to the Speaker of the House of Representatives and the chairman of the Committee on Foreign Relations of the Senate a report setting forth that determination, together with his reasons therefor.

GOVERNMENT OF SOUTH AFRICA BANK ACCOUNTS

Sec. 308. (a) A United States depository institution may not accept, receive, or hold a deposit account from the Government of South Africa or from any agency or entity owned or controlled by the Government of South Africa except for such accounts which may be authorized by the President for diplomatic or consular purposes. For purposes of the preceding sentence, the term "depository institution" has the same meaning as in section 19 (b) (1) of the Federal Reserve Act.

(b) The prohibition contained in subsection (a) shall take effect 45 days after the date of enactment of this Act.

PROHIBITION ON IMPORTATION OF URANIUM AND COAL FROM SOUTH AFRICA

SEC. 309. (a) Notwithstanding any other provision of law, no –

(1) uranium ore,

(2) uranium oxide,

(3) coal, or

(4) textiles,

that is produced or manufactured in South Africa may be imported into the United States.

(b) This section shall take effect 90 days after the date of enactment of this Act.

PROHIBITION ON NEW INVESTMENT IN SOUTH AFRICA

SEC. 310. (a) No national of the United States may, directly or through another person, make any new investment in South Africa.

(b) The prohibition contained in subsection (a) shall take effect 45 days after the date of enactment of this Act.

(c) The prohibition contained in this section shall not apply to a firm owned by black South Africans.

TERMINATION OF CERTAIN PROVISIONS

SEC. 311. (a) This title and sections 501 (c) and 504 (b) shall terminate if the Government of South Africa –

(1) releases all persons persecuted for their political beliefs or detained unduly without trial and Nelson Mandela from prison;

(2) repeals the state of emergency in effect on the date of enactment of this Act and releases all detainees held under such state of emergency;

(3) unbans democratic political parties and permits the free exercise by South Africans of all races of the right to form political parties, express political opinions, and otherwise participate in the political process;

(4) repeals the Group Areas Act and the Population Registration Act and institutes no other measures with the same purposes; and

(5) agrees to enter into good faith negotiations with truly representative members of the black majority without preconditions.

(b) The President may suspend or modify any of the measures required by this title or section 501 (c) or section 504 (b) thirty days after he determines, and so reports to the Speaker of the House of Representatives and the chairman of the Committee on Foreign Relations of the Senate, that the Government of South Africa has –

(1) taken the action described in paragraph (1) of sub-section (a),

(2) taken three of the four actions listed in paragraphs (2) through (5) of subsection (a), and

(3) made substantial progress toward dismantling the system of apartheid and establishing a nonracial democracy,

unless the Congress enacts within such 30-day period, in accordance with section 602 of this Act, a joint resolution

disapproving the determination of the President under this subsection.

(c) It is the policy of the United States to support the negotiations with the representatives of all communities as envisioned in this Act. If the South African Government agrees to enter into negotiations without preconditions, abandons unprovoked violence against its opponents, commits itself to a free and democratic post-apartheid South Africa under a code of law; and if nonetheless the African National Congress, the Pan African Congress, or their affiliates, or other organizations, refuse to participate; or if the African National Congress, the Pan African Congress or other organizations –

(1) refuse to abandon unprovoked violence during such negotiations; and

(2) refuse to commit themselves to a free and democratic post-apartheid South Africa under a code of law,

then the United States will support negotiations which do not include these organizations.

POLICY TOWARD VIOLENCE OR TERRORISM

Sec. 312. (a) United States policy toward violence in South Africa shall be designed to bring about an immediate end to such violence and to promote negotiations concluding with a removal of the system of apartheid and the establishment of a non-racial democracy in South Africa.

(b) The United States shall work toward this goal by diplomatic and other measures designed to isolate those who promote terrorist attacks on unarmed civilians or

those who provide assistance to individuals or groups promoting such activities.

(c) The Congress declares that the abhorrent practice of "necklacing" and other equally inhumane acts which have been practices in South Africa by blacks against fellow blacks are an affront to all throughout the world who value the rights of individuals to live in an atmosphere free from fear of violent reprisals.

TERMINATION OF TAX TREATY AND PROTOCOL

SEC. 313. The Secretary of State shall terminate immediately the following convention and protocol, in accordance with its terms, the Convention Between the Government of the United States of America and the Government of the Union of South Africa for the Avoidance of Double Taxation and for Establishing Rules of Reciprocal Administrative Assistance With Respect to Taxes on Income, done at Pretoria on December 13, 1946, and the protocol relating thereto.

PROHIBITION ON UNITED STATES GOVERNMENT PROCUREMENT FROM SOUTH AFRICA

SEC. 314. On or after the date of enactment of this Act, no department, agency or any other entity of the United States Government may enter into a contract for the procurement of goods or services from parastatal organizations except for items necessary for diplomatic and consular purposes.

PROHIBITION ON THE PROMOTION OF UNITED STATES TOURISM IN SOUTH AFRICA

Sec. 315. None of the funds appropriated or otherwise made available by any provision of law may be available to promote United States tourism in South Africa.

PROHIBITION ON UNITED STATES GOVERNMENT ASSISTANCE TO, INVESTMENT IN, OR SUBSIDY FOR TRADE WITH, SOUTH AFRICA

Sec. 316. None of the funds appropriated or otherwise made available by any provision of law may be available for any assistance to investment in, or any subsidy for trade with, South Africa, including but not limited to funding for trade missions in South Africa and for participation in exhibitions and trade fairs in South Africa.

PROHIBITION ON SALE OR EXPORT OF ITEMS ON MUNITIONS LIST

Sec. 317. (a) Except as provided in subsection (b), no item contained on the United States Munition List which is subject to the jurisdiction of the United States may be exported to South Africa.

(b) Subsection (a) does not apply to any item which is not covered by the United Nations Security Council Resolution 418 of November 4, 1977, and which the President determines is exported solely for commercial purposes and not exported for use by the armed forces, police, or other security forces of South Africa or for other military use.

(c) The President shall prepare and submit to Congress every six months a report describing any license issued pursuant to subsection (b).

MUNITIONS LIST SALES, NOTIFICATION

Sec. 318. (a) Notwithstanding any other provision of this Act, the President shall:

(i) notify the Congress of his intent to allow the export to South Africa any item which is on the United States Munition List and which is not covered by the United Nations Security Council Resolution 418 of November 4, 1977, and

(ii) certify that such item shall be used solely for commercial purposes and not exported for use by the armed forces, police, or other security forces of South Africa or for other military use.

(b) The Congress shall have 30 calendar days of continuous session (computed as provided in section 906 (b) of title 5, United States Code) to disapprove by joint resolution of any such sale.

PROHIBITION ON IMPORTATION OF SOUTH AFRICAN
AGRICULTURAL PRODUCTS AND FOOD

Sec. 319. Notwithstanding any other provision of law, no:

(1) agricultural commodity, product, byproduct of derivitive [sic] thereof,

(2) article that is suitable for human consumption, that is a product of South Africa may be imported into the customs territory of the

United States after the date of enactment of this Act.

PROHIBITION ON IMPORTATION OF IRON AND STEEL

SEC. 320. Notwithstanding any other provision of law, no iron or steel produced in South Africa may be imported into the United States.

PROHIBITION ON EXPORTS OF CRUDE OIL AND PETROLEUM PRODUCTS

SEC. 321. (a) No crude oil or refined petroleum product which is subject to the jurisdiction of the United States or which is exported by a person subject to the jurisdiction of the United States may be exported to South Africa.

(b) Subsection (a) does not apply to any export pursuant to a contract entered into before the date of enactment of this Act.

PROHIBITION ON COOPERATION WITH THE ARMED FORCES OF SOUTH AFRICA

SEC. 322. No agency or entity of the United States may engage in any form of cooperation, direct or indirect, with the armed forces of the Government of South Africa, except activities which are reasonably designed to facilitate the collection of necessary intelligence. Each such activity shall be considered a significant anticipated intelligence activity for purposes of section 501 of the National Security Act of 1947.

PROHIBITIONS ON SUGAR IMPORTS

SEC. 323. (a) (1) Notwithstanding any other provision of law, no sugars, sirups, or molasses that are products of the Republic of South Africa may be imported into the United States after the date of enactment of this Act.

(2) The aggregate quantity of sugars, sirups, and molasses that –

(A) are products of the Philippines, and

(B) may be imported into the United States (determined without regard to this paragraph) under any limitation imposed by law on the quantity of all sugars, sirups, and molasses that may be imported into the United States during any period of time occurring after the date of enactment of this Act,

shall be increased by the aggregate quantity of sugars, sirups, and molasses that are products of the Republic of South Africa which may have been imported into the United States under such limitation during such period if this section did not apply to such period.

(b) (1) Paragraph (c) (i) of headnote 3 of subpart A of part 10 of schedule 1 of the Tariff Schedules of the United States is amended –

(A) by striking out "13.5" in the item relating to the Philippines in the table and inserting in lieu thereof "15.8", and

(B) by striking out the item relating to the Republic of South Africa in the table.

(2) Paragraph (c) of headnote 3 or subpart A of part 10 of schedule 1 of the Tariff Schedules of the United

States is amended by adding at the end thereof the following new subparagraph:

"(iii) Notwithstanding any authority given to the United States Trade Representative under paragraphs (e) and (g) of this headnote –

"(A) the percentage allocation made to the Philippines under this paragraph may not be reduced, and

"(B) no allocation may be made to the Republic of South Africa,

in allocating any limitation imposed under any paragraph of this headnote on the quantity of sugars, sirups, and molasses described in items 155.20 and 155.30 which may be entered.".

TITLE IV – MULTILATERAL MEASURES TO UNDERMINE APARTHEID

NEGOTIATING AUTHORITY

SEC. 401. (a) It is the policy of the United States to seek international cooperative agreements with the other industrialized democracies to bring about the complete dismantling of apartheid. Sanctions imposed under such agreements should be both direct and official executive or legislative acts of governments. The net economic effect of such cooperative should be measurably greater than the net economic effect of the measures imposed by this Act.

(b) (1) Negotiations to reach international cooperative arrangements with the other industrialized democracies and other trading partners of South Africa on measures to bring about the complete dismantling of

apartheid should begin promptly and should be concluded not later than 180 days from the enactment of this Act. During this period, the President or, at his direction, the Secretary of State should convene an international conference of the other industrialized democracies in order to reach cooperative agreements to impose sanctions against South Africa to bring about the complete dismantling of apartheid.

(2) The president shall, not less than 180 days after the date of enactment of this Act, submit to the Congress a report containing –

(A) a description of United States efforts to negotiate multilateral measures to bring about the complete dismantling of apartheid; and

(B) a detailed description of economic and other measures adopted by the other industrialized countries to bring about the complete dismantling of apartheid, including an assessment of the stringency with which such measures are enforced by those countries.

(c) If the President successfully concludes an international agreement described in subsection (b) (1), he may, after such agreement enters into force with respect to the United States, adjust, modify, or otherwise amend the measures imposed under any provision of sections 301 through 310 to conform with such agreement.

(d) Each agreement submitted to the Congress under this subsection shall enter into force with respect to the United States if (and only if) –

(1) the President, not less than 30 days before the day on which he enters into such

agreement, notifies the House of Representatives and the Senate of his intention to enter into such an agreement, and promptly thereafter publishes notice of such intention in the Federal Register;

(2) after entering into the agreement, the President transmits to the House of Representatives and to the Senate a document containing a copy of the final legal text of such agreement, together with –

(A) a description of any administrative action proposed to implement such agreement and an explanation as to how the proposed administrative action would change or affect existing law, and

(B) a statement of his reasons as to how the agreement serves the interest of United States foreign policy and as to why the proposed administrative action is required or appropriate to carry out the agreement; and

(3) a joint resolution approving such agreement has been enacted within 30 days of transmittal of such document to the Congress.

(e) It is the sense of the Congress that the President should instruct the Permanent Representative of the United States to the United Nations to propose that the United Nations Security Council, pursuant to Article 41 of the United Nations Charter, impose measures against South Africa of the same type as are imposed by this Act.

LIMITATION ON IMPORTS FROM OTHER COUNTRIES

SEC. 402. The President is authorized to limit the importation into the United States of any product or service of a foreign country to the extent to which such

foreign country benefits from, or otherwise takes commercial advantage of, any sanction or prohibition against any national of the United States imposed by or under this Act.

PRIVATE RIGHT OF ACTION

SEC. 403. (a) Any national of the United States who is required by this Act to terminate or curtail business activities in South Africa may bring a civil action for damages against any person, partnership, or corporation that takes commercial advantage or otherwise benefits from such termination or curtailment.

(b) The action described in subsection (a) may only be brought, without respect to the amount in controversy, in the United States district court for the District of Columbia or the Court of International Trade. Damages which may be recovered include lost profits and the cost of bringing the action, including a reasonable attorney's fee.

(c) The injured party must show by a preponderance of the evidence that the damages have been the direct result of defendant's action taken with the deliberate intent to injure the party.

TITLE V - FUTURE POLICY TOWARD SOUTH AFRICA

ADDITIONAL MEASURES

SEC. 501. (a) It shall be the policy of the United States to impose additional measures against the Government of South Africa if substantial progress has not been made within twelve months of the date of

enactment of this Act in ending the system of apartheid and establishing a nonracial democracy.

(b) The President shall prepare and transmit to the Speaker of the House of Representatives and the chairman of the Committee on Foreign Relations of the Senate within twelve months of the date of enactment of this Act, and every twelve months thereafter, a report on the extent to which significant progress has been made toward ending the system of apartheid, including –

(1) an assessment of the extent to which the Government of South Africa has taken the steps set forth in section 101 (b) of this Act;

(2) an analysis of any other actions taken by the Government of South Africa in ending the system of apartheid and moving toward a nonracial democracy; and

(3) the progress, or lack of progress, made in reaching a negotiated settlement to the conflict in South Africa.

(c) If the President determines that significant progress has not been made by the Government of South Africa in ending the system of apartheid and establishing a nonracial democracy, the President shall include in the report required by subsection (b) a recommendation on which of the following additional measures should be imposed:

(1) a prohibition on the importation of steel from South Africa;

(2) a prohibition on military assistance to those countries that the report required by section 508 identifies as continuing to circumvent the international embargo on arms and military technology to South Africa;

(3) a prohibition on the importation of food, agricultural products, diamonds, and textiles from South Africa;

(4) a prohibition on United States banks accepting, receiving, or holding deposit accounts from South African nationals; and

(5) a prohibition on the importation into the United States of strategic minerals from South Africa.

(d) A joint resolution which would enact part or all of the measures recommended by the President pursuant to subsection (c) shall be considered in accordance with the provisions of section 602 of this Act.

LIFTING OF PROHIBITIONS

Sec. 502. (a) Notwithstanding any other provision of this Act, the President may lift any prohibition contained in this Act imposed against South Africa if the President determines, after six months from the date of the imposition of such prohibition, and so reports to Congress, that such prohibition would increase United States dependence upon any member country or observer country of the Council for Mutual Economic Assistance (C.M.E.A.) for the importation of coal or any strategic and critical material by an amount which exceeds by weight the average amounts of such imports from such country during the period 1981 through 1985.

(b) (1) Not later than 30 days after the date of enactment of this Act, the Secretary of Commerce shall prepare and transmit to the Congress a report setting forth for each country described in subsection (a) –

(A) the average amount of such imports from such country during the period of 1981 through 1985; and

(B) the current amount of such imports from such country entering the United States.

(2) Thirty days after transmittal of the report required by paragraph (1) and every thirty days thereafter, the President shall prepare and transmit the information described in paragraph (1) (B).

STUDY OF HEALTH CONDITIONS IN THE "HOMELANDS" AREAS OF SOUTH AFRICA

SEC. 503. The Secretary of State shall conduct a study to examine the state of health conditions and to determine the extent of starvation and malnutrition now prevalent in the "homelands" areas of South Africa and shall, not later than December 1, 1986, prepare and transmit to the Speaker of the House of representatives and the chairman of the Committee on Foreign Relations of the Senate a report setting forth the results of such study.

REPORT ON SOUTH AFRICAN IMPORTS

SEC. 504. (a) Not later than 90 days after the date of enactment of this Act, the President shall submit to the Speaker of the House of Representatives and the chairman of the Committee on Foreign Relations of the Senate a report on the extent to which the United States is dependent on the importation from South Africa of –

(1) chromium,

(2) cobalt,

(3) manganese,

(4) platinum group metals,

(5) ferroalloys, and

(6) other strategic and critical materials (within the meaning of the Strategic and Critical Materials Stock Piling Act).

(b) The President shall develop a program which reduces the dependence, if any, of the United States on the importation from South Africa of the materials identified in the report submitted under subsection (a).

STUDY AND REPORT ON THE ECONOMY OF SOUTHERN AFRICA

SEC. 505. (a) The President shall conduct a study on the role of American assistance in southern Africa to determine what needs to be done, and what can be done to expand the trade, private investment, and transport prospects of southern Africa's landlocked nations.

(b) Not later than 180 days after the date of enactment of this Act, the President shall prepare and transmit to the chairman of the Committee on Foreign Affairs of the House of Representatives and the chairman of the Committee on Foreign Relations of the Senate a report setting forth the findings of the study conducted under subsection (a).

REPORT ON RELATIONS BETWEEN OTHER INDUSTRIALIZED DEMOCRACIES AND SOUTH AFRICA

SEC. 506. (a) Not later than 180 days after the date of enactment of this Act, the President shall prepare and transmit to the Speaker of the House of Representatives

and the chairman of the Committee on Foreign Relations of the Senate a report containing a detailed assessment of the economic and other relationships of other industrialized democracies with South Africa. Such report shall be transmitted without regard to whether or not the President successfully concluded an international agreement under section 401.

(b) For purposes of this section, the phrase "economic and other relationships" includes the same types of matters as are described in sections 201, 202, 204, 205, 206, 207, sections 301 through 307, and sections 309 and 310 of this Act.

STUDY AND REPORT ON DEPOSIT ACCOUNTS OF SOUTH AFRICAN NATIONALS IN UNITED STATES BANKS

SEC. 507. (a) (1) The Secretary of the Treasury shall conduct a study on the feasibility of prohibiting each depository institution from accepting, receiving, or holding a deposit account from any South African national.

(2) For purposes of paragraph (1), the term "depository institution" has the same meaning as in section 19 (b) (1) of the Federal Reserve Act.

(b) Not later than 180 days after the date of enactment of this Act, the Secretary of the Treasury shall submit to the Speaker of the House of Representatives and the chairman of the Committee on Foreign Relations of the Senate a report detailing the findings of the study required by subsection (a).

STUDY AND REPORT ON THE VIOLATION OF THE INTERNATIONAL EMBARGO ON SALE AND EXPORT OF MILITARY ARTICLES TO SOUTH AFRICA

SEC. 508. (a) The President shall conduct a study on the extent to which the international embargo on the sale and exports of arms and military technology to South Africa is being violated.

(b) Not later than 179 days after the date of enactment of this Act, the President shall submit to the Speaker of the House of Representatives and the chairman of the Committee on Foreign Relations of the Senate a report setting forth the findings of the study required by subsection (a), including an identification of those countries engaged in such sale or export, with a view to terminating United States military assistance to those countries.

REPORT ON COMMUNIST ACTIVITIES IN SOUTH AFRICA

SEC. 509. (a) Not later than 90 days after the date of enactment of this Act, the President shall prepare and transmit to the Speaker of the House of Representatives and the chairman of the Committee on Foreign Affairs of the House of Representatives and the chairman of the Committee on Foreign Relations of the Senate an unclassified version of a report, prepared with the assistance of the Director of the Central Intelligence Agency, the Director of the Defense Intelligence Agency, the National Security Advisor, and other relevant United States Government officials in the intelligence community, which shall set forth the activities of the Communist

Party in South Africa, the extent to which Communists have infiltrated the many black nonwhite South African organizations engaged in the fight against the apartheid system, and the extent to which any such Communist infiltration or influence sets the policies and goals of the organizations with which they are involved.

(b) At the same time the unclassified report in subsection (a) is transmitted as set forth in that subsection, a classified version of the same report shall be transmitted to the chairmen of the Select Committee on Intelligence of the Senate and of the Permanent Select Committee on Intelligence of the House of Representatives.

PROHIBITION ON THE IMPORTATION OF SOVIET GOLD COINS

SEC. 510. (a) No person, including a bank, may import into the United States any gold coin minted in the Union of Soviet Socialist Republics or offered for sale by the Government of the Union of Soviet Socialist Republics.

(b) For purposes of this section, the term "United States" includes the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) Any individual who violates this section or any regulations issued to carry out this section shall be fined not more than five times the value of the rubles involved.

ECONOMIC SUPPORT FOR DISADVANTAGED SOUTH AFRICANS

SEC. 511 (a) Chapter 4 of part II of the Foreign Assistance Act of 1961 is amended by adding at the end thereof the following new section:

"SEC. 535. ECONOMIC SUPPORT FOR DISADVANTAGED SOUTH AFRICANS. – (a) (1) Up to $40,000,000 of the funds authorized to be appropriated to carry out this chapter for the fiscal year 1987 and each fiscal year thereafter shall be available for assistance for disadvantaged South Africans. Assistance under this section shall be provided for activities that are consistent with the objective of a majority of South Africans for an end to the apartheid system and the establishment of a society based on non-racial principles. Such activities may include scholarships, assistance to promote the participation of disadvantaged South Africans in trade unions and private enterprise, alternative education and community development programs.

"(2) Up to $3,000,000 of the amounts provided in each fiscal year pursuant to subsection (a) shall be available for training programs for South Africa's trade unionists.

"(b) Assistance provided pursuant to the section shall be made available notwithstanding any other provision of law and shall not be used to provide support to organizations or groups which are financed or controlled by the Government of South Africa. Nothing in this subsection may be construed to prohibit programs which are consistent with subsection (a) and which award scholarships to students who choose to attend South African-supported institutions.".

(b) Not later than 90 days after the date of enactment of this Act, the Secretary of State shall prepare and transmit to the Congress a report describing the strategy of the President during the five-year period beginning on such date regarding the assistance of black Africans pursuant to section 535 of the Foreign Assistance Act of 1961 and describing the programs and projects to be funded under such section.

REPORT ON THE AFRICAN NATIONAL CONGRESS

Sec. 512. (a) Not later than 180 days after the date of enactment of this Act, the Attorney General shall prepare and transmit to the Congress a report on actual and alleged violations of the Foreign Agents Registration Act of 1938, and the status of any investigation pertaining thereto, by representatives of governments or opposition movements in Subsaharan Africa, including, but not limited to, members or representatives of the African National Congress.

(b) For purposes of conducting any investigations necessary in order to provide a full and complete report, the Attorney General shall have full authority to utilize civil investigative demand procedures, including but not limited to the issuance of civil subpenas [sic].

TITLE VI – ENFORCEMENT AND ADMINISTRATIVE PROVISIONS

REGULATORY AUTHORITY

Sec. 601. The President shall issue such rules, regulations, licenses, and orders as are necessary to carry out the provisions of this Act, including taking such steps as

may be necessary to continue in effect the measures imposed by Executive Order 12532 of September 9, 1985, and Executive Order 12535 of October 1, 1985, and by any rule, regulation, license, or order issued thereunder (to the extent such measures are not inconsistent with this Act).

CONGRESSIONAL PRIORITY PROCEDURES

SEC. 602. (a) (1) The provisions of this subsection apply to the consideration in the House of Representatives of a joint resolution under sections 311 (b), 401 (d), and 501 (d).

(2) A joint resolution shall, upon introduction, be referred to the Committee on Foreign Affairs of the House of Representatives.

(3) (A) At any time after the joint resolution placed on the appropriate calendar has been on that calendar for a period of 5 legislative days, it is in order for any Member of the House (after consultation with the Speaker as to the most appropriate time for the consideration of that joint resolution) to move that the House resolve itself into the Committee of the Whole House on the State of the Union for the consideration of that joint resolution. The motion is highly privileged and is in order even though a previous motion to the same effect has been disagreed to. All points of order against the joint resolution under clauses 2 and 6 of Rule XXI of the Rules of the House are waived. If the motion is agreed to, the resolution shall remain the unfinished business of the House until disposed of. A motion to reconsider the vote by which the motion is disagreed to shall not be in order.

(B) Debate on the joint resolution shall not exceed ten hours, which shall be divided equally between a Member favoring and a Member opposing the joint resolution. A motion to limit debate is in order at any time in the House or in the Committee of the Whole and is not debatable.

(C) An amendment to the joint resolution is not in order.

(D) At the conclusion of the debate on the joint resolution, the Committee of the Whole shall rise and report the joint resolution back to the House, and the previous question shall be considered as ordered on the Joint resolution to final passage without intervening motion.

(b) (1) The provisions of this subsection apply to the consideration in the Senate of a joint resolution under section 311 (b), 401 (d), or 501 (d).

(2) A joint resolution shall, upon introduction, be referred to the Committee on Foreign Relations of the Senate.

(3) A joint resolution described in this section shall be considered in the Senate in accordance with procedures contained in paragraphs (3) through (7) of section 8066 (c) of the Department of Defense Appropriations Act, 1985 (as contained in Public Law 98-473), except that –

(A) references in such paragraphs to the Committee on Appropriations of the Senate shall be deemed to be references to the Committee on Foreign Relations of the Senate; and

(B) amendments to the joint resolution are in order.

(c) For purposes of this subsection, the term "joint resolution" means only –

(A) in the case of section 311 (b), a joint resolution which is introduced in a House of Congress within 3 legislative days after the Congress receives the report described in section 311 (b) and for which the matter after the resolving clause reads as follows: "That the Congress, having received on ___ the report of the President containing the determination required by section 311 (b) of the Comprehensive Anti-Apartheid Act of 1986, disapproves of such determination.", with the date of the receipt of the report inserted in the blank;

(B) in the case of section 401 (d) (3), a joint resolution which is introduced in a House of Congress within 3 legislative days after the Congress receives the document described in section 401 (d) (2) and for which the matter after the resolving clause reads as follows: "That the Congress, having received on ___ the text of the international agreement described in section 401 (d) (3) of the Comprehensive Anti-Apartheid Act of 1986, approves of such agreement.", with the date of the receipt of the text of the agreement inserted in the blank; and

(C) in the case of section 501 (d), a joint resolution which is introduced in a House of Congress within 3 legislative days after the Congress receives the determination of the President pursuant to section 501 (c) and for which the matter after the resolving clause reads as follows: "That the Congress, having received on ___ a determination of the President under section 501 (c) of the Comprehensive Anti-Apartheid Act of 1986, approves the President's

determination.", with the date of the receipt of the determination inserted in the blank.

(d) As used in this section, the term "legislative day" means a day on which the House of Representatives or the Senate is in session, as the case may be.

(e) This section is enacted –

(1) as an exercise of the rulemaking powers of the House of Representatives and the Senate, and as such it is deemed a part of the Rules of the House and the Rules of the Senate, respectively, but applicable only with respect to the procedure to be followed in the House and the Senate in the case of joint resolutions under this section, and it supersedes other rules only to the extent that it is inconsistent with such rules; and

(2) with full recognition of the constitutional right of the House and the Senate to change their rules at any time, in the same manner, and to the same extent as in the case of any other rule of the House or Senate, and of the right of the Committee on Rules of the House of Representatives to report a resolution for the Consideration of any measure.

ENFORCEMENT AND PENALTIES

SEC. 603. (a) (1) The President with respect to his authorities under section 601 shall take the necessary steps to ensure compliance with the provisions of this Act and any regulations, licenses, and orders issued to carry out this Act, including establishing mechanisms to monitor compliance with this Act and such regulations, licenses, and orders.

(2) In ensuring such compliance, the President may –

(A) require any person to keep a full record of, and to furnish under oath, in the form of reports or otherwise, complete information relative to any act or transaction described in this Act either before, during, or after the completion thereof, or relative to any interest in foreign property, or relative to any property in which a foreign country or any national thereof has or has had any interest, or as may be otherwise necessary to enforce the provisions of this Act; and

(B) conduct investigations, hold hearings, administer oaths, examine witnesses, receive evidence, take depositions, and require by subpena the attendance and testimony of witnesses and the production of all books, papers, and documents relating to any matter under investigation.

(b) Except as provided in subsection (d) –

(1) any person that violates the provisions of this Act, or any regulation, license, or order issued to carry out this Act shall be subject to a civil penalty of $50,000;

(2) any person, other than an individual, that willfully violates the provisions of this Act, or any regulation, license, or order issued to carry out this Act shall be fined not more than $1,000,000;

(3) any individual who willfully violates the provisions of this Act or any regulation, license, or order issued to carry out this Act shall be fined not more than $50,000, or imprisoned not more than 10 years, or both; and

(4) any individual who violates section 301 (a) or any regulations issued to carry out that section shall, instead of the penalty set forth in paragraph (2), be fined not more than 5 times the value of the krugerrands or gold coins involved.

(c) (1) Whenever a person commits a violation under subsection (b) –

(A) any officer, director, or employee of such person, or any natural person in control of such person who knowingly and willfully ordered, authorized, acquiesced in, or carried out the act or practice constituting the violation, and

(B) any agent of such person who knowingly and willfully carried out such act or practice,

Shall be fined not more than $10,000, or imprisoned not more than 5 years, or both.

(2) Paragraph (1) shall not apply in the case of a violation by an individual of section 301 (a) of this Act or of any regulation issued to carry out that section.

(3) A fine imposed under paragraph (1) on an individual for an act or practice constituting a violation may not be paid, directly or indirectly, by the person committing the violation itself.

(d) (1) Any person who violates any regulation issued under section 208 (d) or who, in a registration statement or report required by the Secretary of State, makes any untrue statement of a material fact or omits to state a material fact required to be stated therein or necessary to make the statements therein not misleading, shall be subject to a civil penalty of not more than $10,000

imposed by the Secretary of State. The provisions of subsections (d), (e), and (f) of section 11 of the Export Administration Act of 1979 shall apply with respect to any such civil penalty.

(2) Any person who commits a willful violation under paragraph (1) shall upon conviction be fined not more than $1,000,000 or imprisoned not more than 2 years, or both.

(3) Nothing in this section may be construed to authorize the imposition of any penalty for failure to implement the Code of Conduct.

APPLICABILITY TO EVASIONS OF ACT

Sec. 604. This Act and the regulations issued to carry out this Act shall apply to any person who undertakes or causes to be undertaken any transaction or activity with the intent to evade this Act or such regulations.

CONSTRUCTION OF ACT

Sec. 605. Nothing in this Act shall be construed as constituting any recognition by the United States of the homelands referred to in this Act.

STATE OR LOCAL ANTI-APARTHEID LAWS, ENFORCE

Sec. 606. Notwithstanding section 210 of Public Law 99-349 or any other provision of law –

(1) no reduction in the amount of funds for which a State or local government is eligible or entitled under any Federal law may be made, and

(2) no other penalty may be imposed by the Federal Government,

by reason of the application of any State or local law concerning apartheid to any contract entered into by a State or local government for 90 days after the date of enactment of this Act.

THOMAS S. FOLEY
Speaker pro tempore.

STROM THURMOND
President of the Senate pro tempore.

IN THE HOUSE OF REPRESENTATIVES, U.S.,
September 29, 1986.

The House of Representatives having proceeded to reconsider the bill (H.R. 4868) entitled "An Act to prohibit loans to, other investments in, and certain other activities with respect to, South Africa, and for other purposes", returned by the President of the United States with his objections, to the House of Representatives, in which it originated, it was

Resolved, That the said bill pass, two-thirds of the House of Representatives agreeing to pass the same.

BENJAMIN J. GUTHRIE
Clerk

I certify that this Act originated in the House of Representatives.

BENJAMIN J. GUTHRIE
Clerk

IN THE SENATE OF THE UNITED STATES,
October 2 (legislative day, September 24), 1986

The Senate having proceeded to reconsider the bill (H.R. 4868) entitled "An Act to prohibit loans to, other investments in, and certain other activities with respect to, South Africa, and for other purposes", returned by the President of the United States with his objections, to the House of Representatives, in which it originated, and passed by the House of Representatives on reconsideration of the same, it was

Resolved, That the said bill pass, two-thirds of the Senators present having voted in the affirmative.

JO-ANNE L. COE
Secretary.

LEGISLATIVE HISTORY - H.R. 4868 (S. 2701):

HOUSE REPORTS: No. 99-638, Pt. 1 (Comm. on Foreign Affairs) and Pt. 2 (Comm. on Ways and Means).

SENATE REPORTS: No. 99-370 accompanying S. 2701 (Comm. on Foreign Relations).

CONGRESSIONAL RECORD, Vol. 132 (1986):

June 18, considered and passed House.
Aug. 13, 14, S. 2701 considered in Senate.
Aug. 15, S. 2701 considered in Senate; H.R. 4868 considered and passed Senate, amended.
Sept. 12, House concurred in Senate amendment.

WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 22 (1986):

Oct. 2, Presidential veto message.

CONGRESSIONAL RECORD, Vol. 132 (1986):

Sept. 29, House overrode veto.
Oct. 2, Senate overrode veto.

APPENDIX C

ENROLLED

SEAL

BILL NO. 1144

ORDINANCE NO. 765

AN ORDINANCE concerning

DIVESTITURE OF FUNDS-SOUTH AFRICA AND NAMIBIA

FOR the purpose of ending the investment of public pension funds in firms doing business in or with South Africa And NAMIBIA.

BY adding

Article 22-Retirement Systems
Subtitle-Employees' Retirement System
Section 7(a)(13)
Baltimore City Code (1983) Replacement Volume, as amended)

Article 22-Retirement Systems
Subtitle-Fire and Police Employees
Section 35(a)(13)
Baltimore City Code (1983) Replacement Volume, as amended)

SECTION 1. *Be it ordained by the Mayor and City Council of Baltimore, That Section(s) of the Baltimore City Code (1983 Replacement Volume, as amended) be added, repealed, or amended, to read as follows:*

ARTICLE 22-RETIREMENT SYSTEMS

EXPLANATION: *Italics indicate new matter added to existing law.*
[Brackets] indicate matter stricken from existing law.
CAPITALS indicate amendments to bill.
~~*Strike out*~~ *indicates matter stricken out of bill.*

Employees' Retirement System

7. Management of funds.

(a) Trustee of funds. The Board of Trustees shall be the trustees of the several funds of the Employees' Retirement System of Baltimore created by Article 22 under this subtitle as provided in Section 8. The Board of Trustees shall have the power to invest and reinvest such funds in the following types or classes of assets subject to the limitations, if any, as set forth with regard to each type or class of investment.

(13)(i)~~No~~ON THE FIRST DAY OF THE THIRD QUARTER OF FISCAL YEAR 1987. NO monies or funds held under any provisions of the Retirement System shall remain invested or hereinafter be invested in the stocks, securities or other obligations of any bank or financial institution which makes loans to the Republic of South Africa or Namibia, or to a national corporation of the Republic of South Africa or Namibia, or in the stocks, securities, or other obligations of any company doing business in or with the Republic of South Africa or Namibia, or whose subsidiary or affiliate does business in or with the Republic of South Africa or Namibia.

(ii) Business entities doing business in or with the Republic of South Africa shall be identified by reference to the most recent annual report of the ~~American Consulate General of Johannesburg, entitled "American Firms, Subdivisions and Affiliates – South Africa"~~ AFRICAN FUND ENTITLED "UNIFIED LIST OF UNITED STATES COMPANIES WITH INVESTMENTS OR LOANS IN SOUTH AFRICA AND NAMIBIA".

(iii) Business entities doing business in or with the Republic of Namibia shall be identified through correspondence with the United Nation's Office of the Commissioner for Namibia and the United Nations' Center for Transnational Corporations.

Fire and Police Employees

35. Managements of funds.

(a) Trustee of funds. The Board of Trustees shall be the trustees of the several funds of the Fire and Police Employees' Retirement System of Baltimore created by Article 22 under this subtitle as provided in Section 36. The Board of Trustees shall have the power to invest and reinvest such funds in the following types or classes of assets subject to the limitation, if any, as set forth with regard to each type or class of investment.

(13)(i)~~No~~ ON THE FIRST DAY OF THE THIRD QUARTER OF FISCAL YEAR 1987, NO *monies or funds held under any provision of the Retirement System shall remain invested or hereinafter be invested in the stocks, securities or other obligations of any bank or financial institution which makes loans to the Republic of South Africa or Namibia,*

or to a national corporation of the Republic of South Africa or Namibia, or in the stocks, securities, or other obligations of any company doing business in or with the Republic of South Africa or Namibia, or whose subsidiary or affiliate does business in or with the Republic of South Africa or Namibia.

(ii) Business entities doing business in or with the Republic of South Africa shall be identified by reference to the most recent annual report of the ~~American Consulate General of Johannesburg, entitled "American Firms, Subdivisions and Affiliates – South Africa"~~ AFRICAN FUND ENTITLED "UNIFIED LIST OF UNITED STATES COMPANIES WITH INVESTMENTS OR LOANS IN SOUTH AFRICA AND NAMIBIA".

(iii) Business entities doing business in or with the Republic of Namibia shall be identified through correspondence with the United Nations' Office of the Commissioner for Namibia and the United Nations' Center for Transnational Corporations.

~~SEC.2. *And be it further ordained, That the divestiture required by Section 1 of this ordinance shall be completed within two years of final approval of this ordinance. During that two year period, the Boards of Trustees of the Retirement Systems shall make regular reports to the Mayor and City Council concerning the progress of divestiture. If, prior to expiration of the two year time limit for divestiture, either Board determines that completion of divestiture within the two year time limit will necessitate substantial losses to its Retirement System, then that Board shall request from City Council an extension of time within which to complete divestiture.*~~

SEC.2. *AND BE IT FURTHER ORDAINED,*

(A) THAT, SUBJECT TO THE PROVISIONS OF THIS SECTION, THE DIVESTITURE REQUIRED BY SECTION 1 OF THIS ORDINANCE SHALL BE COMPLETED WITHIN THE TIME LIMIT ESTABLISHED IN THIS ORDINANCE.

(B) THAT THE TIME LIMIT SHALL BEGIN ON THE FIRST DAY OF THE THIRD QUARTER OF FISCAL YEAR 1987.

(C) THAT DURING THE TIME LIMIT THE BOARDS OF TRUSTEES OF THE RETIREMENT SYSTEMS SHALL MAKE QUARTERLY REPORTS TO THE MAYOR AND CITY COUNCIL CONCERNING THE PROGRESS OF DIVESTITURE.

(D) THAT, DURING THE TIME LIMIT, THE BOARDS OF TRUSTEES OF THE RETIREMENT SYSTEMS MAY FROM TIME TO TIME SUSPEND THE DIVESTITURE PROGRAM PROVIDED THE SUSPENDING BOARD ADOPTS A RESOLUTION PURSUANT TO THIS SECTION.

(E) THAT WHEN A BOARD OF TRUSTEES OF EITHER RETIREMENT SYSTEM ADOPTS A RESOLUTION SUSPENDING THE DIVESTITURE PROGRAM UNDER THIS SECTION, THE SUSPENDING BOARD SHALL FIND AS FOLLOWS:

(1) THAT THE ~~CURRENT EARNINGS~~ RATE OF RETURN ON THE FUNDS ARE SUBSTANTIALLY LOWER THAN THE AVERAGE OF THE ANNUAL EARNINGS ON THE FUNDS OVER THE PAST FIVE YEARS, AND

(2) THAT CONTINUED DIVESTITURE UNDER THIS ORDINANCE WILL BE INCONSISTENT WITH GENERALLY ACCEPTED INVESTMENT STANDARDS FOR CONSERVATORS OF PENSION FUNDS NOTWITHSTANDING THE INTENT OF THIS ORDINANCE, OR

(3) THAT DIVESTITURE UNDER THE DIVESTITURE PROGRAM WILL CAUSE FINANCIAL LOSSES TO THE FUNDS.

(F) THAT WHEN A BOARD OF TRUSTEES OF THE RETIREMENT SYSTEMS ADOPTS A RESOLUTION SUSPENDING THE DIVESTITURE PROGRAM UNDER THIS SECTION, THE RESOLUTION SHALL:

(1) STATE THE STANDARDS AND CONCLUSIONS FOR THE SUSPENSION;

(2) SET FORTH THE DURATION OF THE SUSPENSION AND THE TIME OF RESUMPTION OF THE DIVESTITURE PROGRAM; HOWEVER, THE PERIOD OF SUSPENSION SHALL NOT EXCEED 90 DAYS AND THE TIME LIMIT SHALL BE TOLLED FOR THE PERIOD OF SUSPENSION; AND

(3) BE IN WRITING AND SHALL BE SENT TO THE MAYOR, PRESIDENT OF THE CITY COUNCIL, AND THE DEPARTMENT OF LEGISLATIVE REFERENCE.

SEC.3. *AND BE IT FURTHER ORDAINED, THAT THE TIME LIMIT FOR DIVESTITURE UNDER THIS ORDINANCE IS 2 YEARS.*

SEC. 3 4. And be it further ordained, That this ordinance shall take effect on the date of its enactment.

Examined and reported by the Board of Estimates on

.... 19......

....

Clerk

Examined by the .... Committee

on .... 19......................

and reported ....

....

Chairman

A TRUE COPY
HAROLD R. TALL
ACTING DIRECTOR OF
FINANCE

	Date	Journal Page
Introduced (First Reading)	....	
Second Reading	....	
Third Reading	....	

The vote on final passage being:

Yeas .... Nays .... Pass .... Absent ....

....

Chief Clerk

Certified as duly passed and presented to His Honor, the Mayor, this
JUN 26 1986 day of .... 19......

(signed) Clarence H. Burns
President, Baltimore City Council

Approved this JUL 3 1986 day of
.... 19......

(signed) William D. Schaefer
Mayor, Baltimore City

Seal

BILL NO. 677

ORDINANCE NO ....

A RESOLUTION of the Mayor and City Council concerning

EXPLANATION: *Italics indicate new matter added to existing law.*

[Brackets] indicate matter stricken from existing law.

CAPITALS indicate amendments to bill.

~~Strike out~~ indicates matter stricken out of bill.

SOUTH AFRICAN INVESTMENTS

FOR the purpose of declaring that it is the City's intention to disinvest the City's retirement funds from companies doing business in South Africa or Namibia; and requiring the Boards of Trustees of the retirement funds to provide a list of investments in companies doing business in South Africa and Namibia within 30 days and to provide a plan of tangible steps that the City will take in opposition to apartheid.

WHEREAS, The policy of apartheid as maintained by the present government of the Republic of South Africa is not only morally repugnant to all who believe in the inherent rights of individual freedom and equal treatment under the law and has resulted in the systematic enslavement and subjugation of the non-white majority of South Africa and Namibia, but also the continuance of the policy casts doubt on the safety and stability of investments in companies doing business with, operating in or making loans to the Republic of South Africa or Namibia; and

WHEREAS, We recognize that the investment of American and foreign capital in South Africa or Namibia lends support to those governments and their economies, thus contributing to the maintenance and enforcement of apartheid, and we are particularly concerned about the extent to which the investments of the City's pension funds support and sustain the abhorrent policy of apartheid; and

WHEREAS, The Boards of Trustees of the Employees' Retirement System, the Fire and Police Employees' Retirement System and the Elected Officials Retirement

System have a fiduciary responsibility to manage the assets of those retirement systems prudently, as well as in a manner consistent with sound public policy; now, therefore.

SECTION 1. *Be it resolved by the Mayor and City Council of Baltimore.* That it is ~~the~~ ITS intention ~~of the City of Baltimore~~ to immediately proceed with the process of disinvesting all monies ~~of~~ HELD IN TRUST BY the City retirement systemS from the stocks, securities or other obligations of any company or subsidiary or affiliate doing business in South Africa or Namibia and to carry out this divestiture with responsible fiscal prudence;

SEC. 2. *And be it further resolved,* That the Boards of Trustees of the City's retirement systems shall, within 30 days of the passage of this resolution, provide to the Mayor and to the City Council a schedule of investments in companies and corporations doing business in or lending money to South Africa and Namibia;

SEC 3. *And be it further resolved,* That the Boards of Trustees of the City's retirement systems shall, within 90 days of the passage of this resolution, present to the Mayor and to the City Council an investment proposal designed to encourage the United States and foreign corporations whose securities are held in the portfolios of those retirement systems to improve their treatment of their non-white employees in South Africa and Namibia and take other tangible steps in substantial opposition to apartheid.

Examined and reported by the Board of Estimates on

.... 19......

....

Clerk

Examined by the .... Committee

on .... 19......................

and reported ....

....

Chairman

	Date	Journal Page
Introduced (First Reading)	....	
Second Reading	....	
Third Reading	....	

The vote on final passage being:

Yeas .... Nays .... Pass .... Absent ....

....

Chief Clerk

Certified as duly passed and presented to His Honor, the Mayor, this

..........day of.......... 19...

. . . .
President, Baltimore City Council

Approved this . . . . day of
. . . . 19. . . . . .

. . . .
Mayor, Baltimore City

APPENDIX D

IN THE COURT OF APPEALS OF MARYLAND

Nos. 95 & 104

September Term, 1987

BOARD OF TRUSTEES OF THE
EMPLOYEES RETIREMENT SYSTEM
OF THE CITY OF BALTIMORE et al.

v. (95)

MAYOR AND CITY COUNCIL OF
BALTIMORE CITY

* * *

YALE LUBMAN et al.

v. (104)

MAYOR AND CITY COUNCIL OF
BALTIMORE CITY

Murphy, C.J.
Eldridge
Cole
Rodowsky
McAuliffe
Adkins
Blackwell,

JJ.

Opinion by Eldridge, J.

Filed: September 1, 1989

These cases involve numerous challenges to two Baltimore City ordinances requiring that Baltimore City employee pension systems divest their holdings in companies doing business in South Africa.

The pertinent facts are as follows. The City of Baltimore maintains three employee pension systems: The Elected Officials Retirement System (E.O.S.), the Fire and Police Employees Retirement System (F. & P.), and the Employees Retirement System (E.R.S.). Each system is administered by a Board of Trustees,[1] which is responsible for ensuring that members and beneficiaries ultimately receive the benefits to which they are entitled. As of December 31, 1986, the total sum accumulated in the three systems was approximately $1.2 billion.[2] Virtually all of these assets are invested in either equities or common stocks (40% to 50%), fixed income instruments (40% to 50%), or cash and short-term equivalents.

Under each system, members are entitled to specific future benefits (defined benefits). In addition, the systems include a "variable benefits" program, which provides additional benefits that depend directly on the rate of return on the funds. Under this program, if the rate of return in a given year exceeds 7.5%, then all of the excess between 7.5% and 10% goes toward the payment of additional benefits; in addition, if the rate of return exceeds 10%, then half the excess over 10% goes toward the payment of additional benefits while the City receives the other half.[3]

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[1] Although each system is independent and has its own Board of Trustees, the Trustees of the E.R.S. also serve as the Trustees of the much smaller E.O.S.

[2] The parties agreed that December 31, 1986, would be the date from which all calculations in this case would be made.

[3] The variable benefit program does not provide for additional benefits on a one-time-only basis. Instead, the money

(Continued on following page)

In 1986 the City Council of Baltimore passed, and on July 3, 1986, the Mayor of Baltimore signed, Ordinance No. 765, which amended Baltimore City Code (1976, 1983 Repl. Vol., 1986 Cum. Supp.), Art. 22, §§ (7)(a), (35)(a). Section 1(i) of the Ordinance provides that no funds of the E.R.S. or the F. & P. shall remain invested in, or in the future be invested in, banks or financial institutions that make loans to South Africa or Namibia or companies "doing business in or with" those countries.[4] Section 1(ii) of the Ordinance states that entities doing business in or with South Africa, within the meaning of § 1(i), "shall be

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(Continued from previous page)

dedicated to variable benefits is placed in guaranteed investment contracts, which are similar to annuities. Under these contracts, eligible beneficiaries receive a sum equal to a certain percentage of their defined benefits; they will continue to receive that sum, generally, for as long as they live. If money is available in subsequent years for the payment of further variable benefits, the new benefits are compounded with the benefits previously awarded. Thus, as the system continues to generate variable benefits, the amount of a beneficiary's variable benefits and, consequently, the amount of his total benefits will continue to increase.

[4] Namibia or "South West Africa" is a territory that has been administered by South Africa since 1921. *See* 17 *Encyclopaedia Britanica* 300 (15th ed. 1977). On December 14, 1988, South Africa signed an agreement providing for Namibian independence with elections to be held on November 1, 1989, and adoption of a new constitution several months thereafter. *The New York Times*, Dec. 14, 1988, at a14. The timetable for Namibia's transition to independence was set in motion on April 1, 1989, under the supervision of a United Nations Transitional Assistance Group. *The New York Times*, April 2, 1989, at A3. In this opinion, reference to South Africa will be deemed to include Namibia.

identified by reference to the most recent annual report of the Africa Fund entitled 'Unified List of United States Companies with Investments or Loans in South Africa and Namibia.' "[5] Section 3 of the Ordinance further stipulates that divestiture shall occur within the two-year period. That period began to run on January 1, 1987. *See* § 2(b). Section 2(d) empowers a Board of Trustees to suspend divestiture during this two-year period, provided that, before acting, the Board adopts a resolution. Under § 2(e), the Board, in adopting such a resolution, must find:

> "(1) That the rate of return on the funds [is] substantially lower than the average of the annual earnings on the funds over the past five years, and
>
> (2) That continued divestiture under this ordinance will be inconsistent with generally accepted investment standards for conservators of pension funds notwithstanding the intent of this ordinance, or
>
> (3) That divestiture under the divestiture program will cause financial losses to the funds."

Finally, in § 2(f), the Ordinance specifies that, when adopting a suspension resolution, a Board must state in writing its standards and conclusions, and set forth the duration of the suspension; the period of suspension,

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[5] Similarly, § 1(iii), which is not expressly challenged in this case, provides that entities doing business in or with Namibia "shall be identified through correspondence with the United Nations Office of the Commissioner for Namibia and the United Nations Center for Transnational Corporations."

however, may not exceed 90 days, and the two-year time period for divestiture is tolled during the suspension.

Apparently because Ordinance No. 765 by its terms applies only to the E.R.S. and the F. & P., it was unclear whether the E.O.S. was also required to divest. As a result, the City Council passed and the Mayor signed Ordinance No. 792, which amended Baltimore City Code (1976, 1983 Repl. Vol., 1986 Cum. Supp.), Art. 22, § 23(b), to provide expressly that the City's divestiture program applies to the E.O.S.[6]

As of November 1987, the two-year period for divestiture had not begun to run for the F. & P. and the E.R.S. For each quarter since the Ordinances' effective date, the Trustees of those systems have found, among other things, that the "rate of return on the funds [has been]

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[6] The Divestiture Ordinances represent the culmination of several years of legislative effort. In 1983 the City Council considered, but rejected, Bill No. 1608, which, like Ordinance No. 765, called for divestiture over a flexible, two-year time period. On September 23, 1985, the City Council, unanimously adopted Resolution No. 42, which stated the City's intention immediately to proceed with the process of disinvestment. In addition, this Resolution called upon the Boards of Trustees of the City's Retirement Systems to submit an investment proposal designed to encourage businesses in which the City's pension funds were invested to improve conditions for their nonwhite employees in South Africa and to take other steps in opposition to apartheid. In response, on November 21, 1985, the Trustees adopted a resolution generally calling only for a ban on new investment in businesses that did not abide with the Sullivan Principles, a code of fair employment practices for businesses operating in South Africa. The Divestiture Ordinances resulted in part from the perceived inadequacy of the Trustees' November 21 resolution.

substantially lower than the average of the annual earnings on the funds over the past five years." Thus, as for those systems, the divestiture program has been suspended for successive 90-day periods.

On December 31, 1986, the Trustees of each of the City's three employee pension systems, and two employee beneficiaries, filed this action against the Mayor and City Council of Baltimore, asking the Circuit Court for Baltimore City to declare the Ordinances invalid. In support of this request, the Trustees contended: that § (1)(ii) of Ordinance No. 765 impermissibly delegates legislative power to the Africa Fund, a private entity; that the Ordinances unconstitutionally impair the obligation of the City's pension contracts with the systems' beneficiaries; that the federal Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, 100 Stat. 1086 (1986), preempts the Ordinances; that the Ordinances intrude on the federal government's exclusive power to conduct foreign policy; and that the Ordinances violate the Commerce Clause of the United States Constitution, Art. I, § 8, cl. 3. On January 9, 1987, four pension fund beneficiaries, raising related arguments, moved to intervene on the side of the Trustees.[7]

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[7] In the three count complaint, the applicants for intervention argued that the Ordinances intruded on the federal government's exclusive foreign policy power, violated the Commerce Clause, and violated the beneficiaries' property rights "under the 'taking' clause of the Fifth and Fourteenth Amendments."

The Trustees moved for summary judgment.[8] After hearing argument on March 26, 1987, the circuit court denied the motion for summary judgment, finding it necessary first to determine facts concerning the Ordinances' financial impact. On April 6, 1987, the circuit court denied the motion to intervene.[9]

During the trial, which took place between June 22 and July 10, 1987, the parties presented a large amount of highly technical evidence concerning the Ordinances' financial impact. Thereafter the circuit court filed an opinion and a declaratory judgment containing numerous findings and conclusions. The circuit court, based on the evidence of financial impact, held that "it cannot be concluded that the Ordinance[s] will impair the performance of the equity funds."[10] In reaching this decision, the trial

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[8] The applicants for intervention also filed a "proposed" motion for summary judgment. The Court stated that it would treat this motion and the supporting memoranda as an amicus brief if intervention were denied.

[9] In reaching this decision, the court first held that the applicants did not have "an unconditional right to intervene as a matter of law" under Maryland Rule 2-214(a)(1), since, under a contrary ruling, "every pensioner or prospective pensioner of the City retirement systems (a staggering multitude) would have to be made parties. . . ." The court then found no basis for intervention as of right under Rule 2-214(a)(2), concluding that the Trustees adequately represented the applicants' interest. Finally, the court denied permissive intervention under Rule 2-214(b), noting that additional counsel would cause delay and that the applicants could adequately present their views in an amicus brief.

[10] The parties had agreed that the Ordinances would not affect the funds' fixed income investments.

judge discounted the parties' evidence detailing the performance of other South Africa free (S.A.F.) equity funds:

> "Some have fared better than the unrestricted equity funds of the same money manager; some fared worse. Many did better than the [Standard & Poor 500 Index].[11] All the experts agreed, however, that the track records of these SAF funds is too short (less than three years) to be statistically significant."

Moreover, the court noted that "not one witness was able to express the opinion that the percentage return on the plaintiffs' equity investment will be reduced because of the Divestment Ordinance[s]."

The circuit court indicated that the Ordinances barred investments in 120 of the 500 companies on the Standard & Poor 500 (S & P 500). The court further recognized that these companies represent approximately 40% of the market capitalization of the S. & P. 500.[12] Thus, the court found that, under the Ordinances, the pension systems' portfolio will have more investments in relatively smaller companies whose stock prices tend to be more volatile. The court stated, however, that this was

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[11] The Standard & Poor 500, an index of approximately 500 stocks representing a cross-section of various sectors of the economy, is designed to reflect the movement of the market as a whole.

[12] A corporation's market capitalization is equal to the number of shares outstanding multiplied by the price per share. The market capitalization of the S. & P. 500 is, therefore, the combined market capitalization of all corporations listed on that index.

not necessarily a disadvantage, reasoning that in the long run such stocks perform as well or better than larger companies' stocks.

The Trustees had attempted to show that the Ordinances would adversely affect their money managers' "active" style, which had proved very successful. Generally, this style emphasizes investments in certain sectors of the economy in an attempt to surpass rather than merely to duplicate the market's performance.[13] The circuit court found that, by eliminating some potential investments in certain sectors, the Ordinances would affect the active style. Nonetheless, the court deemed any interference to be insignificant, concluding that "adequate SAF [South Africa free] replacement stocks can be found for each sector, even though the SAF companies will be replacing larger companies."

The Trustees had also introduced evidence purporting to show that the Ordinances would diminish the quality of the pension systems' portfolio by requiring money managers to forego their "first choice." The circuit court disagreed, stating that "it is not axiomatic that the manager's second choice is inferior to the first." The court explained that money managers ordinarily invest in a limited number of companies with which they are familiar.[14] Thus, the court found that the Ordinances

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[13] Other forms of active management emphasize the application of certain criteria in the selection of individual stocks. Such criteria include yield and the ratio of price to book-value.

[14] According to the Trustees, a money manager typically holds positions in from 40 to 60 companies. By contrast, the record shows that approximately 5,000 stocks are publicly traded.

would merely require money managers to do additional research in order to locate adequate replacement stocks.

The court did find that the Ordinances would affect the Short Term Investment Fund (S.T.I.F.). The S.T.I.F. is a fund of very short-term investment paper that is pooled in a local bank with the funds of other owners and is issued to meet immediate or short-term liquidity requirements. The Ordinances affect participation in the pooled S.T.I.F., since that fund invests in companies doing business in South Africa. As comparable substitutes may not be readily available, the pension systems' S.T.I.F. may be forced to increase its ratio of investments in lower-yielding obligations, such as Treasury Bills. Moreover, unlike the pooled S.T.I.F., most South Africa free S.T.I.F.s charge management fees. These two factors, the circuit court found, would result in a decreased annual return on the pension systems' S.T.I.F. of .75% or $900,000.

The court also found that the Ordinances require divestiture of 47% of the pension funds' equity portfolio and 10% of the fixed income portfolio. The parties agreed that replacing these holdings with S.A.F. investments would lead to some initial, one-time costs; however, they disagreed as to the extent of the costs.[15] The Trustees had attempted to prove that, in addition to "explicit" costs (such as broker's fees or commissions), transactions of this magnitude adversely affect stock prices and thereby result in additional, "implicit costs. Noting that other experts reject this theory, the circuit court declined to

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[15] The Trustees' expert placed this figure at between $4.4 million and $5.5 million. According to the City's expert, the figure was only $540,000.

credit the Trustees' evidence. In addition, the court accepted the City's contention that the cost of transactions that would have occurred absent divestiture should be subtracted from the total costs of divestiture. Consequently, the court fixed the initial cost of divesting the funds' equity and fixed income portfolios at $750,000.[16]

Finally, the court observed that, because of the smaller size of S.A.F. companies, divestiture will result in a larger volume of trading. This in turn, the court found will cause an annual increase in broker's commissions of $300,000.

In summary, the trial court fixed the initial cost of divestiture at $750,000, or one-sixteenth of 1% of the funds' total value. In addition, the court calculated that the ongoing cost of divestiture is $1.2 million per year ($900,000 for the S.T.I.F. and $300,000 for additional commissions), or one-tenth of 1% of the funds' total value. The court reasoned further: "If the Pension Funds earn in excess of 10% (as has regularly been the case since 1984), the loss to the retirees is halved, since the City takes one-half of the excess earnings." Consequently, the court concluded that the initial cost to the systems' beneficiaries is actually only 1/32 of 1% and that the ongoing cost is actually only 1/20 of 1%.[17]

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[16] Of this sum, the court found that $500,0000 was attributable to divestment of the equity portfolio and $250,000 was attributable to divestment of the fixed income portfolio.

[17] Specifically, the trial judge found that "nothing in the evidence suggests that the Ordinance[s] will in any way

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In light of the Ordinances' "minimal" effect and the "salutary moral principle" underlying them, the circuit court rejected the Trustee' impairment of contract argument.

The court upheld § 1(ii) of Ordinance 765, which provides that entities doing business in South Africa shall be identified by reference to the Africa Fund's "Unified List." The circuit court construed the ordinance to mean that "[t]he Unified List is merely a 'reference,' which the Trustees may accept or reject," and that the "the Trustees are the final authority to determine whether a company is disqualified." Accordingly, the court held that § 1(ii) did not impermissibly delegate legislative power to a private entity. The trial judge also rejected the Trustees' other challenges to the Ordinances.[18]

(Continued from previous page)

jeopardize the amount or payment of defined benefits." He further found that, even assuming the existence of a contractual right to variable benefits, "the extent of the impairment is without legal significance." As noted previously, *supra* n.3, variable benefits that have already accrued but are payable in the future are funded by guaranteed investment contracts purchased from insurance companies. Thus, the Ordinances have no effect on these benefits.

[18] Additionally, in a number of interpretive rulings, the circuit court held: (1) that the power to suspend the divestiture program permits new investment, during the period of suspension, in companies doing business in South Africa; (2) that the two-year time period for divestiture must be extended for a further time equal to the length of any valid period of suspension; (3) that the Ordinances do not limit the number of times

(Continued on following page)

The Trustees and the applicants for intervention both appealed to the Court of Special Appeals. On the parties' joint request, we issued a writ of certiorari to consider the important issues presented.

I.

Initially, we shall address the denial of the motion by four pension fund beneficiaries to intervene on the side of the Trustees. In denying the motion, the circuit court ruled that the applicants were not entitled to intervene as a matter of right under Maryland Rule 2-214(a)(1) or (2), and ruled that they would not be granted permissive intervention under Rule 2-214(b).

We disagree that the applicants were not entitled to intervene as a matter of right under Rule 2-214(a)(2). Rule 2-214(a)(2) provides in pertinent part:

> "Upon timely motion, a person shall be permitted to intervene in an action: . . . (2) when the person claims an interest relating to the property or transaction that is the subject of the action, and the person is so situated that the disposition of the action may as a practical matter impair or impede the ability to protect that

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(Continued from previous page)

that the Trustees can suspend divestiture; and (4) that the Trustees can order suspension at any time before the time limit has run, even if total divestiture has already occurred.

None of the parties has challenged these interpretative rulings.

interest unless it is adequately represented by existing parties."

Plainly the applicants, as beneficiaries, "clai[m] an interest relating to the property . . . that is the subject of the action." Moreover, a ruling upholding the Ordinances' validity would be res judicata in a separate action by the applicants. Restatement (Second) of Judgments, § 41(1)(a) (1982). *See Uqast v. LaFontaine,* 189 Md. 227, 233, 55 A.2d 705 (1947) (judgment for constructive trustee was res judicata in subsequent action brought by beneficiaries of constructive trust). *See also Sea-Land Services, Inc. v. Gaudet,* 414 U.S. 573, 593-594, 94 S.Ct. 806, 819, 39 L.Ed.2d 9 (1974). Consequently, the applicants are "so situated that the disposition of the action may as a practical matter impair or impede" their ability to protect their interests.[19] Indeed, the trial court in its opinion did not find otherwise.

The basis for the trial court's denial of intervention as of right was the court's conclusion that the Trustees adequately represent the applicant's interests.

In *Citizens Coordinating Comm. v. TKU,* 276 Md. 705, 713, 351 A.2d 133 (1976), we pointed out that under the intervention of right provision of former Rule 208, the rule requires only that the representation by existing

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[19] We caution that, to show that the disposition of an action may as a practical matter impair or impede his ability to protect his interest, an applicant need merely show that he might be disadvantaged by the disposition of the action in which he sought to intervene; he need not make the additional showing that the disposition of that action would be res judicata as to him. *See* Citizens Coordinating Comm. v. TKU, 276 Md. 705, 711-712, 351 A.2d 133 (1976).

parties "may be inadequate." In *Maryland Radiological v. Health Serv.*, 285 Md. 383, 402 A.2d 907 (1979), which was also decided under former Rule 208, we adopted an "interest analysis" test to determine whether existing representation is adequate. Referring to the discussion in 7A C. Wright & A. Miller, *Federal Practice and Procedure* § 1909 (1972), Judge Digges for the Court explained that test as follows (285 Md. at 390-391, 402 A.2d at 911-912):

> "First, these authors suggest the obvious: If the potential newcomer's interest is not represented or advocated to any degree by an existing party, or if the existing parties all have interests that are adverse to those of the proposed intervenor, he is unrepresented and, assuming compliance with the other provisions of Rule 208 a, intervention should be permitted. . . . Second, if the applicant's interest is similar but not identical to that of an existing party, 'a discriminating judgment is required on the circumstances of the particular case, but he ordinarily should be allowed to intervene unless it is clear that the party will provide adequate representation for the absentee.' *Id.* (footnote omitted). Third, if the interest of an existing party and an intervenor-applicant are identical, or if an existing party is charged by law with representing a movant's interest, 'a compelling showing should be required to demonstrate why this representation is not adequate.' "

Also, in both the *TKU* case, 276 Md. at 712, 351 A.2d at 138, and the *Maryland Radiological* case, 285 Md. at 388 n. 5, 402 A.2d at 910 n. 5, we pointed out that intervention decisions under Rule 24 of the Federal Rules of Civil Procedure serve as a guide to interpreting the Maryland Rule.

Because of his fiduciary duties to the Trust's beneficiaries, a trustee is charged by law with representing the beneficiaries' interests. Consequently, in cases under Rule 24, F.R. Civ. P., courts often view the interests of a trustee and the beneficiaries as the same, conclude that the trustee will adequately represent the beneficiary's interests, and deny to the beneficiaries intervention as of right. *See, e.g., Heyman v. Exchange Nat. Bank of Chicago,* 615 F.2d 1190, 1194 (7th Cir. 1980); *Peterson v. United States,* 41 F.R.D. 131, 133-134 (D.Minn. 1966); *Kind v. Markham,* 7 F.R.D. 265, 266 (S.D.N.Y 1945). The cases recognize, however, that where there is a conflict between the interests of the trustee and beneficiaries, or when other circumstances exist whereby the representation by the trustee may be inadequate, the beneficiaries will be granted intervention. *See e.g., Swift v. Swift,* 61 F.R.D. 595, 597-598 (E.D.N.Y. 1973); *Peterson v. United States, supra,* 41 F.R.D. at 134; *Federal Home Loan Bank v. Long Beach Fed. S. & L. Ass'n,* 122 F.Supp. 401, 435 (S.D. Cal. 1954).

The trustees of a public pension system do not necessarily occupy precisely the same position as the trustees of a conventional private trust. It is true that, like ordinary trustees, the persons administering Baltimore's retirement funds are charged with fiduciary duties of loyalty and care toward the systems' beneficiaries. In the present case, however, the Trustees have obligations to the City as well. As to variable benefits, which are the only benefits affected by the Ordinances, Baltimore City receives one-half of the systems' excess earnings over 10%. Thus, with respect to these benefits, the City is a co-beneficiary. Moreover, in this case the Boards of Trustees are agencies of Baltimore City, which is the party opponent in this litigation. The Trustees are municipal officials

with some responsibility to comply with the City's directives. In essence, the Trustees are prosecuting this lawsuit against their employer. The present case, therefore, is very different from an ordinary action brought on behalf of beneficiaries. In fact, it should be noted in this context that, during Baltimore's last mayoral election campaign, one of the issues between the candidates concerned the propriety of permitting the Trustees to prosecute an appeal in the present case. *See The Sun* (Baltimore), August 29, 1987, at 5A.

In light of the Trustees' peculiar role, we conclude that the beneficiaries' interests are "similar but not identical" to those of the Trustees. *See Maryland Radiological v. Health Serv., supra,* 285 Md. at 390, 402 A.2d at 912. In our opinion it is not sufficiently clear, under the facts of the present case, that the Trustees will adequately represent the applicants. The prospect that the Trustees might not ask the United States Supreme Court to review an unfavorable ruling in this Court is not entirely unlikely in light of past events. A decision not to seek Supreme Court review would adversely affect the applicants, who would be bound by our ruling.

Consequently, under these circumstances, we hold that the Trustees may not adequately represent the applicants' interests. Thus, the trial court erred in holding that the applicants were not entitled to intervene as a matter of right under Rule 2-214(a)(2).[20]

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[20] We are not persuaded that, because two beneficiaries have been named as co-plaintiffs, that interests of other

(Continued on following page)

When a trial court has erroneously denied a motion to intervene, the ordinary remedy is to reverse and remand the case so that the intervenor may present the evidence that he originally would have produced. *See e.g., Citizens Coordinating Comm. v. TKU, supra,* 276 Md. at 714, 351 A.2d at 139. In the case at bar, however, the applicants took the position, during oral argument before us, that they do not desire a remand for this purpose. Rather, they only wish to have the status of parties in the present proceeding before this Court and for all future proceedings in the case, including the right to seek review in the United States Supreme Court. As a consequence, the circuit court's error does not require reversal. Instead, we shall exercise our authority under Rule 8-604(e) to modify the circuit court's judgment so as to grant the applicants' motion to intervene.

II.

Section 1(ii) of Ordinance 765 provides that "[b]usiness entities doing business in or with the Republic of South Africa shall be identified by reference to the most recent annual report of the Africa Fund entitled 'Unified List of United States Companies With Investments or Loans in South Africa and Namibia.' " The Trustees

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(Continued from previous page)

beneficiaries are adequately represented. As the applicants point out (Brief at 52), "the prosecution and appeal of this action is being maintained under the authority and direction of the Trustees." It appears that the Trustees alone direct the conduct of the case and that the presence of the two beneficiaries as co-plaintiffs is largely nominal.

contend that this provision constitutes an impermissible delegation of legislative power to a private entity.

The City agrees that if the Trustees are bound by the South Africa Fund Unified List, and with respect to Namibia bound by the determinations of the United Nations' offices referred to in the Ordinances, then the Ordinances are unconstitutional (City's Brief, p. 31). The City, however, urges that the language of the Ordinances is ambiguous, and it points to the circuit court's construction of the Ordinance No. 765 which was as follows:

> "the directive in the Ordinance that [corporations doing business in or with South Africa] 'shall be identified by reference to the most recent annual report' of the Africa Fund Unified List is merely a 'reference,' which the Trustees may accept or reject."[21]

Under the circuit court's construction, the City's argument continues, there is clearly no impermissible delegation of legislative power.

As the Court stated in *Comm'n on Med. Discipline v. Stillman*, 291 Md. 390, 413, 435 A.2d 747, 759 (1981), "[i]n the enactment of laws, the legislature acts in the exercise of a power conferred upon it by the people; it cannot validly redelegate its lawmaking authority to others." *See Md. Co-op. Milk Producers v. Miller*, 170 Md. 81, 88, 182 A. 432, 435 (1935); *Brawner v. Supervisors*, 141 Md. 586, 595-596, 119 A.250 (1922); *Bradshaw v. Lankford*, 73 Md. 428, 430, 21 A. 66 (1891); *Fell v. State*, 42 Md. 71, 83 (1875);

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[21] The circuit court, went on to point out that the Unified List itself stated that "this list should be used as a starting point for further investigation."

Hammond v. Haines, 25 Md. 541, 562 (1866). *See also Anne Arundel County v. Fraternal Order*, 313 Md. 98, 111, 114-115, 543 A.2d 841 (1988); *Maryland Cl. Emp Ass'n v. Anderson*, 281 Md. 496, 508-509, 380 A.2d 1032, 1039 (1977). This principle follows from the nature of representative democracy. Pursuant to Article XI-A of the Maryland Constitution, and as authorized by Maryland Code (1957, 1987 Repl. Vol.), Art. 25A, the Baltimore City Council has the sole power to enact local legislation for the people of Baltimore City. *Cheeks v. Cedlair Corp.*, 287 Md. 595, 608-609, 415 A.2d 155 (1980).[22] Thus, in enacting legislation, City Council members generally have no authority to substitute the judgment of others for their own judgment. *Md. Co-op Milk Producers v. Miller , supra*, 170 Md. at 88, 182 A. at 435; *Bradshaw v. Lankford, supra*, 73 Md. at 430, 21 A. at 66.

The principle of nondelegation however, is not absolute *See Bradshaw v. Lankford, supra*, 73 Md. at 430, 21 A. at 66. As this Court stated in *Department of Transportation v. Armacost*, 311 Md. 64, 72, 532 A.2d 1056, 1060 (1987), "[o]ur cases have long sanctioned delegations of legislative power to administrative officials where sufficient safeguards are legislatively provided for the guidance of the agency in its administration of the statute." Furthermore, the Court noted in *Price v. Clawns*, 180 Md. 532, 538, 25 A.2d 672, 675 (1942), that "[t]here are many instances in which authority is lodged in and permitted to private

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[22] *See also, e.g.*, Maryland State Administrative Board of Election Law, v. Talbot County, 316 Md. 332, 344-345, 558 A.2d 724 (1989); Griffith v. Wakefield, 298 Md. 381, 386, 388, 470 A.2d 345 (1984).

persons by the Legislature." *See, Portsmouth Stove and Range Company v. Mayor and City Council of Baltimore*, 156 Md. 244, 251-253, 144 A. 357, 360-361 (1929). Nonetheless, delegations of legislative authority to private entities are strictly scrutinized because, unlike governmental officials or agencies, private persons will often be wholly unaccountable to the general public. *See Group Health Ins. of N.J. v. Howell*, 40 N.J. 436, 445, 193 A.2d 103 (1963); *Fink v. Cole*, 302 N.Y. 216, 224, 97 N.E.2d 873 (1951); *Union Trust Co. v. Simmons*, 116 Utah 422, 427-428, 211 P.2d 190 (1949); Note, *The State Courts and Delegation of Authority to Private Groups*, 67 Harv. L. Rev. 1398, 1402 (1954).[23]

A number of cases have held that no impermissible delegation takes place when a legislature merely adopts a fixed standard promulgated by a private entity. *See, e.g., St. Louis, Iron Mt. & Southern Railway Co. v. Taylor*, 210 U.S. 281, 28 S.Ct. 616, 52 L.Ed. 1061 (1908); *Kingery v. Chapple*, 504 P.2d 831, 836 n. 13 (Alaska 1972); *City of Bakersfield v. Miller*, 64 Cal.2d 93, 97-98, 48 Cal. Rptr. 889, 410 P.2d 393, *cert. denied*, 384 U.S. 988, 86 S.Ct. 1890, 16 L.Ed.2d 1005 (1966); *City of Warren v. State Const. Code*

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[23] For example, in Fink v. Cole, *supra*, the New York legislature had vested the Jockey Club, a private corporation, with broad discretion to license owners, trainers, and jockeys at horse races in that state. The Court of Appeals of New York noted that the issuance of licenses is "essentially a sovereign power" and that the stewards of the Jockey Club, who wielded that power under the law, were "neither chosen by, nor responsible to the State government," 302 N.Y. at 224, 97 N.E.2d at 876. Consequently, the court held that the delegation of licensing power to the Jockey Club was "such an abdication as to be patently an unconstitutional relinquishment of legislative power . . . ." 302 N.Y. at 225, 97 N.E.2d at 876.

Com'n, 66 Mich. App. 493, 239 N.W.2d 640 (1976); *People v. Shore Realty,* 127 Misc.2d 419, 486 N.Y.S.2d 124 (1984); *Meyer v. Lord,* 37 Or. App. 59, 586 P.2d 367, 371 (1978); *Dudding v. Automatic Gas Co.,* 193 S.W.2d 517, 520 (Texas 1946). *But cf. Cawley v. Northern Waste Co.,* 132 N.E. 365 (Mass. 1921).

The Ordinance in the present case, however, does not incorporate a fixed standard but a standard that is subject to periodic revision by the Africa Fund. Section 1(ii) of Ordinance No. 765 requires the Trustees to employ the "most recent annual report" of the Africa Fund's Unified List. Courts have frequently viewed the legislative incorporation of future changes or revisions in a standard promulgated by a private entity as an impermissible delegation of authority. *See, e.g., City of Tucson v. Stewart,* 45 Ariz. 36, 40 P.2d 72, 80-81 (1935); *Agnew v. City of Culver City,* 147 Cal.App.2d 144, 153-157, 304 P.2d 788, 795-797 (1956); *People v. Pollution Control Board,* 83 Ill.App.3d 802, 38 Ill. Dec. 928, 404 N.E.2d 352 (1980); *Gumbhir v. Kansas St. Bd. of Pharmacy,* 228 Kan. 579, 618 P.2d 837, 843 (1980); *State v. Crawford,* 104 Kan. 141, 177 P. 360 (1919); *Coffman v. State Board of Examiners in Optometry,* 331 Mich. 582, 50 N.W.2d 322, 326 (1951); *People v. Mobil Oil Corp.,* 101 Misc.2d 882, 422 N.Y.S.2d 589, 592 (1979); *State v. Emery,* 55 Ohio St. 364, 370, 45 N.E. 319 (1896); *Hillman v. Northern Wasco County People's Util. Dist.,* 213 Or. 264, 323 P.2d 664, 674-675 (1958), *overruled on other grounds* in *Maulding v. Clackamas County,* 278 Or. 359, 563 P.2d 731 (1977);

Woodson v. State, 95 Wash.2d 257, 623 P.2d 683, 685 (1980).[24]

On the other hand, courts have sometimes upheld legislative adoption of private organizations' standards which are periodically subject to revision, in limited circumstances such as where the standards are issued by a well-recognized, independent authority, and provide guidance on technical and complex matters within the entity's area of expertise. *See, e.g., Ex Parte Gerino,* 143 Cal. 412, 419, 77 P. 166 (1904); *Colorado Polytechnic College v. State Board for Community Colleges and Occupational Education,* 476 P.2d 38, 42 (Colo. 1970); *Rosenthal v. State Bar Examining Committee,* 116 Conn. 409, 165 A. 211, 214 (1933); *State v. Dee,* 77 So.2d 768 (Fla. 1955); *Lucas v. Maine Com'n of Pharmacy,* 472 A.2d 904 (Me. 1984); *Application of Hansen,* 275 N.W.2d 790, 796-797 (Minn. 1978), *appeal dismissed,* 441 U.S. 938, 99 S.Ct. 2154, 60 L.Ed.2d 1040 (1979); *Appeal of Murphy,* 482 Pa. 43, 393 A.2d 369 (1978), *appeal*

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[24] The principle set forth in these cases does not apply to a delegation of a legislative power to another *governmental* entity. In our complex system of government, state and local as well as state and federal authority unavoidably intermesh. *See, e.g.,* Department of Transportation v. Armacost, 311 Md. 64, 82-83, 532 A.2d 1056 (1987) (to maintain eligibility for federal funds, General Assembly conformed state law to requirements of federal Clean Air Act); Price v. Clawns, 180 Md. 532, 538, 25 A.2d 672 (1942) (statute making it a crime to ride railroad except in compliance with railroad's regulations dovetailed with federal statutes dictating substance of railroad's regulations). As a result, a legislature may ordinarily adopt a standard promulgated by another governmental entity, even if that standard is subject to modification by the other governmental entity.

dismissed, 440 U.S. 901, 99 S.Ct. 1204, 59 L.Ed.2d 449 (1979); *State v. Wakeen*, 263 Wis. 401, 407-412, 57 N.W.2d 364, 367-369 (1953); *Potter v. New Jersey Supreme Court*, 403 F. Supp. 1036, 1040 (D. N.J. 1975), *aff'd*, 546 F.2d 418 (3rd Cir. 1976). These cases usually involve accreditation or similar programs by established professional organizations.[25]

We need not in the present case express agreement or disagreement with the specific holding in any of the above-cited opinions of our sister states concerning delegation to private entities. It is sufficient to point out, in light of the prior decisions of this Court and the cases generally throughout the country, that if the Trustees are bound by the determinations of the private entities listed

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[25] In People v. Pollution Control Board, 83 Ill.App.3d 802, 38 Ill. Dec. 928, 404 N.E.2d 352 (1980), the court held invalid a statutory provision exempting from a noise control ordinance auto racing events sanctioned by, among others, a private group called the Association of Motor Sports. The court deemed the provision an improper delegation. In doing so, the court distinguished cases holding that bar applicants must graduate from American Bar Association-approved law schools (404 N.E.2d at 357-358):

> "[T]he State's interest in assuring qualified legal practitioners was commensurate with the A.B.A.'s interest in maintaining high standards among law schools.
>
> * * *
>
> "The corporate purpose of the Association of Motor Sports is unrelated to the legislature's presumed intent [in enacting the exemption from the noise ordinance]. Therefore, we are not persuaded by the analogy to the ABA's law school approval process."

in the Ordinances, there arises a serious question concerning the validity of the Ordinances under Article XI-A of the Maryland Constitution.

It is a settled "principle that a court will, whenever reasonably possible, construe and apply a statute to avoid casting serious doubt upon its constitutionality." *Yangming Transport v. Revon Products,* 311 Md. 496, 509, 536, A.2d 633 (1988). *See, e.g., Craig v. State,* ___ Md. ___, ___, ___ A.2d ___ (1978); *Heileman Brewing v. Stroh Brewery,* 308 Md. 746, 763-764, 521 A.2d 1225 (1987); *In re Criminal Investigation No. 1-162,* 307 Md. 674, 685, 516 A.2d 976, 982 (1986); *Davis v. State,* 294 Md. 370, 377, 451 A.2d 107, 111 (1982). We agree with the circuit court and the City that this principle is fully applicable to the Ordinances. As Judge Greenfeld pointed out for the court below, the language of the Ordinances, designating the South Africa Fund's Unified List as a "reference," is reasonably subject to the construction that the Trustees are not bound by the list. It is, in the words of the circuit court, "merely a 'reference' which the Trustees may accept or reject."

The circuit court's construction of the Ordinances, which we uphold, avoids casting substantial doubt upon their validity under the cases dealing with delegation of legislative power to private entities. The Trustees have cited no case, and we are aware of none, indicating that it is an impermissible delegation of legislative authority for a legislative body to direct a government agency to use a private entity's list merely as an advisory reference, with the agency being free to decline to follow the list.

Consequently, it is for Trustees to determine whether a particular company is doing business in South Africa.

While the view of the South Africa Fund must be taken into consideration, the Trustees may reject that view with regard to any particular company.

The concept of "doing business" in a particular area involves a matter of degree. If viewed expansively, "doing business" would encompass even the most tangential contacts with South African entities. On the other hand, if construed very narrowly, "doing business" might signify only actual ownership or control of productive assets, such as mines or factories, in South Africa. Clearly, however, the City Council did not contemplate a definition so narrow as to frustrate the objectives of divestiture. Nevertheless, from the Ordinances' references to the Africa's Fund's and United Nations organizations' definitions, it is clear that the City Council sought a responsible standard, and did not wish to bar investments in firms "doing business" under the most expansive sense of that term. In other contexts, we have construed the statutory phrase "doing business" in a geographical area to mean doing a "substantial amount of business" or engaging "in significant business activity" in that area. *See, e.g., Yangming Transport v. Revon Products, supra,* 311 Md. at 504-509, 536 A.2d at 637-640; *S.A.S. Personnel Consult v. Pat-Pan,* 286 Md. 335, 339-340, 407 A.2d 1139, 1142 (1979); *G.E.M., Inc. v. Plough, Inc.,* 228 Md. 484, 488-489, 180 A.2d 478, 481 (1962). In our view, this is the definition which the Trustees should utilize.

III.

According to the Trustees and the beneficiaries, the Ordinances impair the obligations of the beneficiaries'

pension contracts with the City, in violation of the Contract Clause of the United States Constitution, Art. I, § 10. We disagree.

A.

In *Robert T. Foley Co. v. W.S.S.C.*, 283 Md. 140, 151-152, 389 A.2d 350, 357 (1978), we reviewed the framework for determining if governmental action unconstitutionally impairs contractual obligations, saying:

> "Consideration of a claim that particular governmental action invalidly impairs contractual obligations involves several steps. *See United States Trust Co. v. New Jersey*, 431 U.S. 1, 17-21, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977). First, it must be determined whether a contract existed. If that hurdle is successfully cleared by the claimant, a court next must decide whether an obligation under that contract was changed. Finally, if the second question is answered in the affirmative, the issue becomes whether the change unconstitutionally impairs the contract obligation, '[f]or it is not every modification of a contractual promise that impairs the obligation of contract under federal law. . . .' *City of El Paso v. Simmons*, 379 U.S. 497, 506-507, 85 S.Ct. 577, 582-583, 13 L.Ed.2d 446 (1965)."

See State v. Good Samaritan Hospital, 299 Md. 310, 318, 473 A.2d 892, 896, *appeal dismissed*, 469 U.S. 802, 105 S.Ct. 56, 83 L.Ed.2d 7 (1984). *See also State v. Burning Tree Club, Inc.*, 315 Md. 254, 271, 554 A.2d 366 (1989); *Chevy Chase Savings & Loan v. State*, 306 Md. 384, 416, 509 A.2d 670 (1986).

There is no doubt that, by establishing the pension systems, the City imposed contractual obligations on

itself. Under Maryland law, pension plans create contractual duties toward persons with vested rights under the plans. *See, e.g. Archer v. Archer,* 303 Md. 347, 357, 493 A.2d 1074 (1985); *Lookingbill v. Lookingbill,* 301 Md. 283, 289, 483 A.2d 1 (1984); *Deering v. Deering,* 292 Md. 115, 124-128, 437 A.2d 883 (1981); *City of Frederick v. Quinn,* 35 Md.App. 626, 371 A.2d 724 (1977). Moreover, the Baltimore City Code expressly recognizes the existence of a contractual relationship, at least between the City and the members of the F. & P. and the E.R.S. Baltimore City Code (1976, 1983 Repl. Vol.), Art. 22, § 42.[26]

Since divestment does not alter the provisions in the law concerning the amount of benefits that a retiree is entitled to receive, the Ordinances do not directly change the City's pension contracts with the systems' beneficiaries. *Compare Maryland State Teachers Ass'n v. Hughes,* 594 F.Supp. 1353 (D. Md. 1984), *aff'd,* No. 84-2213 (4th Cir. Dec. 5, 1985).

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[26] Section 17(e)(ii) provides, however, that, notwithstanding § 42, any increase in variable benefits "shall not become an obligation of the City of Baltimore." As an alternate ground for his decision, the trial judge held that, by virtue of these sections, the beneficiaries could claim no contractual right to variable benefits. We disagree for two reasons. First, the above disclaimer simply recognizes that future variable benefits depend not on City contributions but on market performance. Second, according to the City Council's file memorandum on the variable benefits ordinance, the disclaimer was also designed to "protect the City from any liability if [the] Variable Benefit Fund . . . does not have sufficient earnings to provide for previously awarded benefits."

The Trustees argue, however, that the Ordinances indirectly change these contracts by modifying the manner in which the pension funds are invested.

The right to receive defined benefits was not indirectly changed. Judge Greenfeld expressly found that "nothing in the evidence suggests that the Ordinances will in any way jeopardize the amount or payment" of the defined benefits. That finding is supported by the evidence and cannot be deemed clearly erroneous under Rule 8-131(c).

The trial court did find that the initial and ongoing costs of divestiture may affect the pension systems' profitability and, as a result, may slightly diminish the level of future variable benefits.[27] Thus, in this respect, the Ordinances may indirectly change the City's obligation under its contracts with the beneficiaries. The cases, however, make it clear that an insubstantial change does not unconstitutionally impair the obligations of a contract. *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411, 103 S.Ct. 697, 704, 74 L.Ed.2d 569 (1983); *Allied Structural Steel Co. v. Spaunaus*, 438 U.S. 234, 244-245, 98 S.Ct. 2716, 2722-2723, 57 L.Ed.2d 727 (1978); *Chevy Chase Savings & Loan v. State, supra*, 306 Md. at 416, 509 A.2d at 686.

The circuit court found that the initial cost of divestiture is one-thirty-second of 1% of the systems' assets and that the ongoing annual cost is one-twentieth of 1%.

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[27] As pointed out previously, the Ordinances have no effect on accrued variable benefits, which are funded by guaranteed investment contracts.

Based on these findings, which are not clearly erroneous, it follows that the circuit court was justified in concluding that the cost of the Ordinances to the retirement systems, and thus to the systems' beneficiaries in terms of future variable benefits, is so minimal that it does not approach the constitutional standard for impairment.[28]

B.

The Trustees further argue that the Ordinances indirectly change the pension contracts by disturbing the beneficiaries' expectations that benefits will be well secured. According to the Trustees, the beneficiaries are entitled to demand that the systems' funds "will be invested prudently for the exclusive benefit of the workers (and their beneficiaries) and for the sole purpose of securing the payment of promised future benefits." (Trustees' Brief, pp. 14-15). Thus the Trustees contend that the contracts incorporate the common-law duties of prudence and loyalty and that the Ordinances alter those duties.

We agree that the pension contracts incorporate the Trustees' common-law duties of prudence and loyalty.

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[28] It should be noted that the circuit court's findings with regard to the effects of divestment seem to be premised upon divestment of holdings in all companies on the South Africa Fund's Unified List. At the same time, as discussed in Part II of this opinion, the circuit court held, and we agree, that the Trustees are not bound by the Unified List. Consequently, depending upon the Trustees' decisions concerning what companies are doing business in South Africa, based on the standards set forth in Part II of this opinion, the costs of divestment could be somewhat lower than found by the circuit court.

Moreover, we shall assume that if legislation substantially alters those duties, the legislation should be viewed as changing the obligations of contract. Nonetheless, in this case, the Trustees have not proven such change.[29]

As stated above, one of the common-law fiduciary duties is the requirement that trustees act prudently in managing trust affairs. *Shipley v. Crouse,* 279 Md. 613, 621, 380 A.2d 97 (1977); *Zimmerman v. Coblentz,* 170 Md. 468, 484, 185 A. 342, 349 (1936); *Johnson v. Webster,* 168 Md. 568, 576, 179 A. 831, 834 (1935); *Fox v. Harris,* 141 Md. 495, 506, 119 A. 256, 260 (1922); *Gilbert v. Kolb,* 85 Md. 627, 634-636, 37 A. 423 (1897); *Gray v. Lynch,* 8 Gill 403, 431 (1849); *Green v. Lombard,* 28 Md.App. 1, 5, 343 A.2d 905, 909, *cert. denied,* 276 Md. 743 (1975). The Court in *Shipley v. Crouse, supra,* 279 Md. at 621, 370 A.2d at 102 (quoting G. Bogert, *The Law of Trust and Trustees,* § 541 (2d ed. 1960), explained as follows:

> " 'A trustee is required to manifest in all his management of the trust the care, skill, prudence, and diligence of an ordinarily prudent man engaged in similar business affairs and

[29] There is very little case law with respect to whether divestiture conflicts with a trustee's duties to beneficiaries. In Associated Students of the Univ. of Or. v. Oregon Inv. Council, No. 78-7502 (Cir. Ct. Lane Co., Or. Jan. 21, 1985), *rev'd* 82 Or.App. 145, 728 P.2d 30 (1986), *petition denied,* 303 Or. 74, 734 P.2d 354 (1987), the trial court held that the trustees of a charitable trust need not comply with the University's divestment resolution, as divestment would violate the statutory prudent investor rule. The intermediate appellate court reversed on the ground that the plaintiffs lacked standing to challenge the trustees' actions. 82 Or.App. 151, 728 P.2d at 33.

> with objectives similar to those of the trust in question.' "

Likewise, Baltimore City Code, Article 22, §§ 7(h) and 35(h), adopt the duty of prudence set forth in § 404(a) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1104(1) (1982)[30]:

> "The Board of Trustees shall discharge its duties . . .
>
> (2) With the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims."

The trustees argue that the Ordinances alter the duty of prudence by radically reducing the universe of eligible investments.

There is no doubt that the Ordinances place some limits on the scope of investment. Using the South Africa Fund's Unified List, the Trustees argue, for example, that they are barred from investing in almost one-half of the market capitalization of the S & P 500. In fact, the correct figure may be substantially smaller, as the Trustees are not bound by the South Africa Fund's determinations. Nevertheless, the Ordinances do exclude a not insignificant segment of the investment universe. *Cf.* Lanoff, *The Social Investment of Private Plan Assets: May It Be Done Lawfully Under ERISA?*, 31 Lab. L. J. 387, 391 (1980). The

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[30] As "governmental plans," the City's systems are exempt from ERISA. 29 U.S.C. §§ 1002(32), 1103(b)(1) (1982).

City, however, has shown that, under the divestiture program, economically competitive, substitute investments remain available.

Furthermore, the Trustees' emphasis on market capitalization is somewhat misleading.[31] While the Ordinances seem to ban investments in many larger companies with a high market capitalization, numerous opportunities remain available. Thus, under Judge Greenfeld's findings, the Ordinances permit the Trustees to construct an almost perfectly diversified portfolio, one that accurately matches the market as a whole in all respects except the size of the companies in which the pension systems invest. Moreover, the Trustees' inability to demonstrate that divestiture will impair the portfolios' equity performance indicates that a diversified, S.A.F. portfolio can be managed consistently with the duty of prudence. In fact, on cross-examination, the Trustees' witnesses conceded that, given a shift to "passive" management, the funds could duplicate the performance of a "target index," such as the S. & P. 500. Thus, divestiture does not imprudently increase risk or decrease income.

The Trustees' chief concern seems to be that, by foreclosing a certain range of investments, the Ordinances will adversely affect the money managers' active style. Yet, assuming arguendo that this is true, there is in our

[31] For example, as the trial court observed, the market capitalization of IBM, a company apparently doing business in South Africa, is equal to that of the 200 smallest companies on the S. & P. 500.

opinion no contractual right to a particular management style.[32]

The provisions regulating the divestiture program reinforce our conclusion that the Ordinances do not change the Trustees duty of prudence. The transition to an S.A.F. portfolio is to occur gradually, over a two-year period. The Ordinances expressly empower the Trustees to suspend the divestiture program at any time for up to 90 days if they find, in essence, that divestiture has become imprudent. *See* § 2(d), (e) of Ordinance No. 765. The parties do not dispute the circuit court's interpretive rulings that the two-year period is extended for the length of any valid suspension and that the Ordinances do not limit the number of times the Trustees can suspend the program. In addition, none of the parties has challenged the trial court's further rulings that, during a suspension, the Trustees may make new investments in

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[32] While Judge Greenfeld concluded that the Ordinances would not significantly affect the active style, some proponents of divestiture disagree. *See* Dobris, *Arguments in Favor of Fiduciary Divestment of "South Afican" Securities,* 65 Neb. L. Rev. 209, 240 n. 285 (1986). One of the Trustees' witnesses did testify, however, that the Ordinances have only a minimal affect on certain active managers. These include "market-timers," who decide when to be in or out of the market, and "top-down managers," who first decide what types of stocks to buy and then fill out their portfolios accordingly.

In any case, a shift to passive management would hardly be imprudent. The Trustees admit that most active managers underperform the market. Moreover, one of the Trustees' experts conceded that passive management in the long run provides more stability, lower transaction costs, and lower risk than active management.

companies doing business in South Africa and that the Trustees may order a suspension at any time before the time limit has run, even if total divestiture has already occurred. We agree with these interpretative rulings by the circuit court. In our opinion, there exist numerous safeguards which guarantee that divestiture cannot occur unless it would be consistent with the Trustees' duty of prudence.

C.

In a related argument, the Trustees contend that the Ordinances alter the duty of prudence by mandating the consideration of social factors unrelated to investment performance. Under the circumstances of this case, we disagree.

No less an authority than Professor Austin Wakeman Scott rejected the proposition that "trustees are rigidly bound to attempt to secure the maximum return, whether as to income or principal, consistent with safety." III *Scott on Trusts*, § 227.17 (W. Fratcher 4th ed. 1988).[33] Instead, Professor Scott concluded (*ibid.*):

> "Trustees in deciding whether to invest in, or to retain, the securities of a corporation may properly consider the social performance of the corporation. They may decline to invest in, or to retain, the securities of corporations whose

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[33] This section, which initially appeared in the supplements to the third edition of the treatise, was authored by Professor Scott himself.

> activities or some of them are contrary to fundamental and generally accepted ethical principles. They may consider such matters as pollution, race discrimination, fair employment, and consumer responsibility."[34]

For this position, Scott relied in part on an analogy to the corporate fiduciary's limited right to make charitable contributions: just as the directors may conclude that charitable contributions are in the corporation's long-term interests, so too a trustee "may well believe that a corporation that has a proper sense of social obligation is

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[34] Similarly, in construing testamentary trusts, some have urged that social factors should override even the testator's express directives. For example, in the litigation concerning the desegregation of Girard College, a school established in Philadelphia in 1833 for "poor white male orphans," it was asserted that the testator's philanthropic designs would best be served by admitted male children of all races. Commonwealth of Pennsylvania v. Brown, 392 F.2d 120, 125 (3d Cir.), *cert. denied,* 391 U.S. 921, 88 S.Ct. 1811, 20 L.Ed.2d 657 (1968); Girard College Trusteeship, 391 Pa. 434, 480-481, 138 A.2d 844, 866 (Musmanno, J., dissenting), *cert. denied,* 357 U.S. 570, 78 S.Ct. 1383, 2 L.Ed.2d 1546 (1958). *See also* Clark, *Charitable Trusts, The Fourteenth Amendment and The Will of Stephen Girard,* 66 Yale L.J. 979, 990 (1957) (suggesting that the moral duty of trustees, who were agents of the city, to Philadelphia's two million citizens "was scarcely less that that to one dead testator"). Additionally, in *Matter of London,* 104 Misc. 372, 377-378, 171 N.Y.S. 981, 983-984 (1918), *aff'd,* 187 A.D. 952, 175 N.Y.S. 910 (1919), the Surrogate Court for New York County upheld an investment in war bonds at 3-1/2% despite the testator's express command that the trustee should invest only in railroad bonds paying at least 4%. Noting that the nation was at war and needed the "undivided aid, support and loyalty of every citizen," the court hypothesized that the testator would have sanctioned this investment had he been alive. *Ibid.*

more likely to be successful in the long run than those that are bent on obtaining the maximum amount of profits." *Ibid.* "But," he continued, "even if this were not so, the investor, though a trustee of funds for others, is entitled to consider the welfare of the community, and refrain from allowing the use of funds in a manner detrimental to society." *Ibid.*

These views are consistent with the position that a trustee's duty is not necessarily to maximize the return on investments but rather to secure a "just" or "reasonable" return while avoiding undue risk. *King v. Talbot,* 40 N.Y. 76, 86 (1869); *Withers v. Teachers' Retirement System,* 447 F.Supp. 1248, 1254, (S.D.N.Y. 1978), *aff'd,* 595 F.2d 1210 (2d Cir. 1979); III *Scott on Trusts, supra,* § 227.3; Restatement (Second) of Trusts § 227 comment (e) (1957); Dobris, *Arguments in Favor of Fiduciary Divestment of "South African" Securities,* 65 Neb. L. Rev. 209, 232 (1986); Ravikoff & Curzan, *Social Responsibility in Investment Policy and The Prudent Man Rule,* 68 Cal. L. Rev. 518, 519 (1980). *Cf.* Troyer, Slocombe & Boisture, Divestment of South Africa Investments: The Legal Implications for Foundations, Other Charitable Institutions, and Pension Funds, 74 Geo. L. J. 127, 156-157 (1985). *But see* Langbein & Posner, *Social Investing and the Law of Trusts,* 79 Mich. L. Rev. 72, 99-104 (1980). As one commentator stated, a "trustee is under no duty to open a brothel in Nevada, where prostitution is legal, in order to maximize return to beneficiaries." Dobris, *supra,* 65 Neb. L. Rev. at 232. Thus, if, as in this case, social investment yields economically competitive returns at a comparable level of risk, the investment should not be deemed imprudent.

The Mayor and City Council of Baltimore were motivated to enact the Ordinances, in part, because the Trustees' prior investment practices offended a growing number of the systems' beneficiaries and residents of the City. Moreover, given the vast power that pension trust funds exert in American society,[35] it would be unwise to bar trustees from considering the social consequences of investment decisions in any case in which it would cost even a penny more to do so. Consequently we conclude that if, as in this case, the cost of investing in accordance with social considerations is *de minimis*, the duty of prudence is not violated.[36] Accordingly, we hold that the Ordinances do not alter that duty.[37]

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[35] "In 1980, public and private pension funds totaled more than $550 billion, owned more than 25% of all publicly traded stock, and controlled more than 40% of all debt capital in the United States." Troyer, Slocombe & Boisture, *supra*, 74 Geo. L. J. at 154 n. 98 (citing McCarroll, *Socially Responsible Investment of Public Pension Funds: The South Africa Issue and State Law*, 10 Rev. L. & Soc. Change 407 (1980-81)). Similarly, in 1980 the United States Department of Labor projected that by 1995 private pension trust assets alone would total almost $3 trillion. Lanoff, *The Social Investment of Private Plan Assets: May It Be Done Lawfully Under ERISA?*, 31 Lab. L. J. 387, 387 (1980).

[36] We recognize that, in absolute terms, the costs of divestiture may be large. As Judge Greenfeld pointed out, however, the costs are *de minimis* when viewed in relation to the systems' total assets.

[37] As noted previously, although the systems are exempt from ERISA, the Baltimore City code incorporates ERISA's language concerning the duty of prudence. Several

(Continued on following page)

D.

Finally, the Trustees contend that the Ordinances alter their duty of loyalty, which is implicit in the pension contracts. We disagree that the Ordinances alter that duty.

Like the duty of prudence, the general duty of loyalty is well-established in Maryland law. *See, e.g., Goldman v. Rubin,* 292 Md. 693, 441 A.2d 713 (1982); *Gianakos v. Magiros,* 238 Md. 178, 208 A.2d 718 (1965); *Hughes v. McDaniel,* 202 Md. 626, 98 A.2d 1 (1953); *Mangels v. Tippett,* 167 Md. 290, 173 A. 191 (1934); *Diffenderffer v. Minder,* 3 G. & J. 311 (1831). Moreover as with the duty of prudence, the Baltimore City Code incorporates ERISA's formulation of the trustee's duty of loyalty (Art. 22, §§ 7(h), 35(h)):

(Continued from previous page)

commentators have written that social investment is likely to violate ERISA. *See, e.g.,* Hutchinson & Cole, *Legal Standards Governing Investment of Pension Assets for Social and Political Goals,* 128 U. Pa. L. Rev. 1340 (1980); Lanoff, *supra,* 31 Lab. L. J. at 390. *See* Langbein & Posner, *Social Investing and the Law of Trusts,* 79 Mich. L. Rev. 72, 98-99 (1980). *But see* Revikoff & Curzan, *Social Responsibility in Investment Policy and The Prudent Man Rule,* 68 Cal. L. Rev. 518, 528-536 (1980). Nonetheless, one of the Trustee's own witnesses, a money manager, conceded that his company did not believe that it violated ERISA by building and managing S.A.F. portfolios subject to the federal Act. He justified this belief by stating that substituting S.A.F. securities for other securities did not involve "taking unusual risks." Moreover, at the time of the ordinances' enactment, the City Council explicitly made the ERISA provisions subject to limitations and conditions prescribed elsewhere in Article 22. *See* Art. 22. §§ 7(h)(4), 35 (h)(4). The Ordinances are such a prescribed limitation or condition.

> "The Board of Trustees shall discharge its duties . . . solely in the interest of the members and beneficiaries and:
>
> (1) For the exclusive purpose of:
>
> (i) providing benefits to members and beneficiaries . . . ."

The Trustees urge that, by requiring them to consider the interests of persons other than the beneficiaries and by requiring them to manage the systems for purposes other than providing benefits, the ordinances change this duty.

It is clear that the trustee's duty of loyalty extends beyond a prohibition against self-dealing and conflict of interest, two wrongs that are not present in this case. Even if the trustee has no personal stake in a transaction, the duty of loyalty bars him from acting in the interest of third parties at the expense of the beneficiaries. *See* Restatement (Second) of Trusts, § 170 comment q (1957); *Conway v. Emeny*, 130 Conn. 612, 621-622, 96 A.2d 221, 225 (1953); *In re Estate of Sedgwick*, 74 Ohio App. 444, 461, 59 N.E.2d 616, 624 (1944).

Nevertheless, we do not believe that a trustee necessarily violates the duty of loyalty by considering the social consequences of investment decisions. If, as in this case, the costs of considering such consequences are *de minimis*, the trustee ordinarily will not have transgressed that duty.

Although Professor Scott termed the trustee's duty of loyalty "[t]he most fundamental duty owed by the trustee to the beneficiaries," IIA *Scott on Trusts, supra*, § 170, he clearly believed that that obligation could be reconciled with considering the ethical implications of the trust's

investments. *See* III *Scott on Trusts, supra,* § 277.17. Our conclusion is consistent with that belief. Moreover, our opinion in this case is broadly consistent with the requirement, embodied in the Baltimore City Code, that the trustees act "solely in the interest of the beneficiaries," and "for the exclusive purpose . . . of providing benefits." As Professor Scott recognized, under some circumstances trustees may well believe that, by investing in businesses with "a proper sense of social obligation," they will in the long run best serve the beneficiaries' interests and most effectively secure the provision of future benefits. *Ibid.*

Consequently, the Ordinances do not change the Trustees' duties of prudence and loyalty, which are implicit in the pension contracts.

For the foregoing reasons, we hold that the Ordinances do not unconstitutionally impair the obligation of contract.

IV.

The intervenors argue that the Ordinances "violated their due process rights under the 'taking' clause of the Fifth and Fourteenth Amendments" (Intervenors' Brief, p. 40). The Intervenors reason that the initial and ongoing costs of divestiture will reduce the future earnings of the pension funds, consequently reducing the amount of variable benefits payable to the beneficiaries. Because of this reduction in the amount of variable benefits, according to the Intervenors, there has been "a confiscation by [the city] government" (*Ibid.*) and "the beneficiaries have been deprived of their right to constitutional due process

as their property has been taken without just compensation" (*id.* at p. 44).[38]

As previously pointed out, the Intervenors have a contractual right to receive both defined benefits and variable benefits. Moreover, the contractual right to receive these benefits constitutes property under Maryland law. *Deering v. Deering, supra,* 292 Md. at 122-128, 437 A.2d at 887-890. *See Archer v. Archer, supra,* 303 Md. at 356-357, 493 A.2d at 1079; *Lookingbill v. Lookingbill, supra,* 301 Md. at 286-290, 483 A.2d at 2-4.[39]

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[38] The Intervenors' argument, as the quotation from their brief indicates, invokes both the Due Process Clause of the Fifth Amendment and the just Compensation Clause of the Fifth Amendment. The substance of the argument, however, seems to be based on the Just Compensation Clause. Clearly no procedural due process argument is made. In addition, the intervenors do not appear to advance a substantive due process argument. To the extent that the intervenors might be making a substantive due process argument, it is without merit. *See generally, e.g.,* Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 124-125, 98 S.Ct. 2207, 2213, 57 L.E.2d. 91 (1978), affirming Governor v. Exxon Corp., 279 Md. 410, 423-429, 370 A.2d 1102, 1110-1113 (1977). Ogrinz v. James, 309 Md. 381, 394-395, 524 A.2d 77 (1987); State v. Good Samaritan Hospital, 299 Md. 310, 325-326, 473 A.2d 892, appeal dismissed, 469 U.S. 802, 105 S.Ct. 56, 83 L.Ed.2d 7 (1984).

[39] The Constitution does not create property rights. Rather, such rights "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ." Board of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). *See also* Cleveland Board of Education v. Loudermill, 470 U.S. 532, 538, 105 S.Ct. 1487, 1491, 84 L.Ed.2d 494 (1985).

The Intervenors' contractual right to receive benefits does not, however, give them a right to direct or control the investment of funds in Baltimore City's pension systems. Absent a provision in the law to the contrary, the beneficiaries of a public retirement system have no right to direct the investment of the systems' assets. *Withers v. Teachers' Retirement System, supra,* 447 F.Supp. at 1260 (the beneficiaries of a public retirement fund "have no entitlement to, or right to direct the retention of, the particular assets that are held for investment purposes in the pension fund"); *Crown v. Patrolmen's Variable Supp. Fund Trustees,* 659 F.Supp. 318, 320 (S.D.N.Y.), *aff'd,* 819 F.2d 47 (2d Cir. 1987). *See Tron v. Condello,* 427 F.Supp. 1175, 1189-1190 (S.D.N.Y. 1976) (beneficiary "has a vested right in receiving his pension benefits, but not in regulating the investment policies set by the Legislature and the Retirement Board").

If the earnings of the pension funds were sufficient to warrant the payment of variable benefits under the pension formula, and such payments were not made, the beneficiaries could reasonably argue they had been lawfully deprived of a property right. There is no sound basis for the claim made in the present case, however, that the beneficiaries' property interest in future variable benefits is unconstitutionally "taken" whenever the City Council or the Trustees act in a way which might reduce the earnings of the pension funds.

As the Supreme Court stated in *Connolly v. Pension Ben. Guar. Corp.,* 475 U.S. 211, 224-225, 106 S.Ct. 1018, 1026, 89 L.Ed.2d 166 (1986), quoting *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 124, 98 S.Ct.

2646, 2659, 57 L.Ed.2d 631 (1978), its decisions under the Just Compensation Clause

> "have eschewed the development of any set formula for identifying a 'taking' forbidden by the Fifth Amendment, and have relied instead on ad hoc, factual inquiries into the circumstances of each particular case . . . . To aid in this determination, however, [the Court has] identified three factors which have 'particular significance': (1) 'the economic impact of the regulation on the claimant'; (2) 'the extent to which the regulation has interfered with distinct investment-backed expectations'; and (3) 'the character of the governmental action.' "

See Chevy Chase Savings & Loan v. State, supra, 306 Md. at 411, 509 A.2d at 684.

The economic impact of the Ordinances might be to deprive the beneficiaries of some variable benefits they would otherwise receive if the Ordinances were not in effect. The degree of this impact is, however, substantially reduced by "provisions in the Act that moderate and mitigate the economic impact." *Connolly v. Pension Ben. Guar. Corp., supra,* 475 U.S. at 225, 106 S.Ct. at 1026. The provision in the Ordinances allowing for the postponement of divestment, for example, and other provisions previously discussed, mitigate any adverse impact on the beneficiaries' variable benefits.

The Ordinances do not interfere with "distict investment-backed expectations." *Connolly, supra,* 475 U.S. at 225, 106 S.Ct. at 1026. The Supreme Court has stated: "A reasonable investment-backed expectation must be more than a 'unilateral expectation or an abstract need.' " *Ruckelshaus v. Monsanto,* 467 U.S. 986, 1005, 104 S.Ct. 2862,

2874, 81 L.Ed.2d 815 (1984), quoting *Webb's Fabulous Pharmacies v. Beckwith,* 449 U.S. 155, 161, 101 S.Ct. 446, 451, 66 L.Ed.2d 358 (1980). Variable benefits are, as their name suggests, speculative and uncertain. Whatever diminution of variable benefits the Ordinances might cause cannot be said to interfere with a "distinct . . . expectation." As the Court said in *Andrus v. Allard,* 444 U.S. 51, 66, 100 S.Ct. 318, 327, 62 L.Ed.2d 210 (1979),

> "loss of future profits – unaccompanied by any physical property restriction – provides a slender reed on which to rest a takings claim. Prediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform. Further, perhaps because of its very uncertainty, the interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests."

Finally, the nature of the governmental action in this case does not involve the government appropriating the beneficiaries' money for its own use or for the use of others. Government regulation under "a public program that adjusts the benefits and burdens of economic life to promote the common good . . . does not constitute a taking requiring Government compensation." *Connolly v. Pension Ben. Guar. Corp., supra,* 475 U.S. at 225, 106 S.Ct. at 1026. The Ordinances here do just that. Any reduction in variable benefits is an incidental cost of the City government's efforts to promote the common good by regulating its own investment policy.

We conclude that the Ordinances do not effect a "taking" of the beneficiaries' property in violation of the Fifth Amendment.

V.

We next address the contention that the Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, 100 Stat. 1086 (1986), codified in relevant part at 22 U.S.C. §§ 2151, 2346(d), 5001-5116 (Supp. IV 1986), preempts the Ordinances.[40] Among other things, the federal Act prohibits new American investment in South Africa; prohibits the importation of certain South African products, including krugerrands, uranium, and coal; forbids the export of computer technology to the South African security forces; limits American loans to the South African government; and restricts nuclear trade with South Africa. *See* 22 U.S.C. §§ 5051-5060. In addition, the federal statute requires American businesses with more than 25 employees in South Africa to comply with the Sullivan Principles, a code of fair employment practices for companies operating in South Africa. 22 U.S.C. §§ 5034-5035. Section 5061 provides for the termination, modification, or suspension of the above sanctions if the South African government makes progress towards abolishing apartheid. Conversely, § 5091 authorizes more stringent sanctions if such progress fails to occur.

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[40] Amendments to the Comprehensive Anti-Apartheid Act of 1986 have been introduced in both the House (H.R. 21, 101st Congress, 1st Sess. (1989)) and Senate (S. 507, 101st Congress, 1st Sess. (1989)). These amendments, if enacted, would prohibit any United States entity from purchasing or holding investments in South Africa under most circumstances.

Federal law may preempt state or local law in different ways.[41] Congress may preempt state law by expressly stating its intention to do so. *California v. ARC America Corp.*, ___ U.S. ___, 109 S.Ct. 1661, 1665, 104 L.Ed.2d 86 (1989); *Hillsborough County, Fla. v. Auto. Med. Labs.*, 471 U.S. 707, 713, 105 S.Ct. 2371, 2375, 85 L.Ed.2d 714 (1985). The Anti-Apartheid Act of 1986 does not expressly preempt state and local divestiture laws. Absent express preemption, a court may infer a congressional intent to preempt from a scheme of federal regulation sufficiently comprehensive to occupy a given field or to make clear that Congress left no room for supplementary state legislation. *California v. ARC America Corp., supra,* 109 S.Ct. at 1665; *Pacific Gas & Electric v. Energy Resources Comm.*, 461 U.S. 190, 204, 103 S.Ct. 1713, 1722, 75 L.Ed.2d 752 (1983); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947). Moreover, even if Congress has not completely preempted state regulation in a particular area, state law is preempted to the extent that it actually conflicts with federal law. *California v. ARC America Corp., supra,* 109 S.Ct at 1665. "Such a conflict arises when 'compliance with both federal and state regulations is a physical impossibility' . . . or when state law 'stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress.' " *Hillsborough County, Fla. v. Auto. Med. Labs., supra,* 471 U.S. at 713, 105 S.Ct. at 2375.

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[41] "[F]or purposes of the Supremacy Clause, the constitutionality of local ordinances is analyzed in the same way as that of state laws." Hillsborough County, Fla. v. Auto. Med. Labs., 471 U.S. 707, 713, 105 S.Ct. 2371, 2375, 85 L.Ed.2d 714 (1985).

Nevertheless, so as not to place undue restrictions upon state sovereignty, preemption is not lightly presumed. *California Federal Sav. & Loan Ass'n v. Guerra,* 479 U.S. 272, 281, 107 S.Ct. 683, 689, 93 L.Ed.2d 613 (1987); *Maryland v. Louisiana,* 451 U.S. 725, 746, 101 S.Ct. 2114, 2129, 68 L.Ed.2d 576 (1981); *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, 132, 98 S.Ct. 2207, 2217, 57 L.Ed.2d (1978), *affirming* 279 Md. 410, 370 A.2d 1102 (1977). Furthermore, in areas traditionally regulated by state and local governments, there is a strong presumption against finding federal preemption. *California v. ARC America Corp., supra,* 109 S.Ct. at 1665; *Hillsborough County, Fla. v. Auto. Med. Labs., supra,* 471 U.S. at 716, 105 S.Ct. at 2376; *Pacific Gas & Electric v. Energy Resources Comm., supra,* 461 U.S. at 206, 103 S.Ct. at 1723; *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 244, 79 S.Ct. 773, 779, 3 L.Ed.2d 775 (1959). In these circumstances there must be compelling evidence of congressional intent to preempt. *San Diego Building Trades Council v. Garmon, supra,* 359 U.S. at 244, 79 S.Ct. at 779.

Baltimore City's regulation of investments by its employees' pension funds is clearly a matter of traditional local regulation. Therefore, the Ordinances enjoy a strong presumption that they are not preempted. The evidence with respect to congressional intent is wholly inadequate to overcome this presumption.

The relevant legislative history begins[42] in 1985, when the Senate was considering legislation (S.B. 995 and

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[42] In fact, the examination could begin as early as 1984, when Congress declined to exercise its plenary powers over the District of Columbia to disapprove of that City's divestiture ordinance.

H.R. 1460, known as the Anti-Apartheid Act of 1985) which would have imposed economic sanctions on South Africa.[43] During the debates on the 1985 legislation, Senators Roth and McConnell had circulated an amendment that would have added express preemptive language; however, "in the face of certain defeat," the proponents of preemption elected not to submit the amendment. *See* 132 Cong. Rec. S 12533 (daily ed., Sept. 15, 1986) (Remarks of Sen. Kennedy); 131 Cong. Rec. S 18331 (daily ed., July 11, 1985) (Remarks of Sen. Kennedy).[44]

In 1986 the preemption debate in the Senate centered around the so-called "D'Amato Amendment," which concerned state and local legislation barring the award of state and local government contracts to companies doing business in South Africa. As originally drafted, the D'Amato amendment would have exempted such legislation from the requirement that contracts using federal funds must be awarded to the lowest bidder. 132 Cong.

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[43] On September 9, 1985, the President promulgated an executive order incorporating most of the economic sanctions contained in the then pending legislation. Exec. Order No. 12532, 3 C.F.R. 387 (1984-1987). No further action was taken on the bill.

[44] In withdrawing the amendment, Senator Roth took the position that the unamended bill would preempt state law. 131 Cong. Rec. S 18835 (daily ed., July 11, 1985). *See also id.* (Remarks of Sen. Lugar). Notwithstanding these assertions, however, many Senators had expressly opposed the Roth-McConnell amendment and taken the position that the bill should not preempt state law. *See, e.g., id.* S 18331 (Remarks of Sen. Kennedy); *id.* S 18330 (Remarks of Sen. Pell); *id.* S 18224 (Remarks of Sen. Cranston); *id.* S 18787 (Remarks of Sen. Hart); *id.* S 18784 (Remarks of Sen. Proxmire).

Rec. S 9305 (Remarks of Sen. D'Amato); *id.* S 9306 (Remarks of Sen. Moynihan).[45] On the final day of debate, Senator Lugar announced his opposition to the amendment, claiming (132 Cong. Rec. S 11817, Aug. 15, 1986) that the Anti-Apartheid Act preempted such local legislation and that the amendment "muddie[d] the water with regard to the preemption issue."[46] With little further discussion, the Senate rejected the amendment. Yet immediately thereafter, Senator D'Amato introduced a compromise measure, which was adopted by unanimous consent, *id.* at S 11818, and became § 5116 of the Act. That section provides:

> Notwithstanding section 210 of Public Law 99-349 or any other provision of law –
>
> > (1) no reduction in the amount of funds for which a State or local government is eligible or entitled under any Federal law may be made, and

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[45] Anti-apartheid procurement legislation purported to prevent the award of a contract to the lowest bidder if that party did business in South Africa. As a result, the United States Department of Transportation had withheld millions of dollars in funds from jurisdictions that enforced the legislation. The original D'Amato Amendment would have permitted these jurisdictions to enforce their anti-apartheid laws without losing federal funds, provided the jurisdictions agreed to pay for any resulting increase in cost. *See* 132 Cong. Rec. S 9305 (daily ed., July 17, 1986) (Remarks of Sen. D'Amato).

[46] Senator Kennedy's later remarks suggest that no Senator had previously raised the preemption issue during the 1986 debates. *See* 132 Cong. Rec. S 12533 (daily ed., Sept. 15, 1986). He also found it "curious" that Senator Lugar did not raise this issue until a unanimous consent agreement governing debate effectively prevented most further amendments. *See id.*

(2) no other penalty may be imposed by the Federal Government,

by reason of the application of any State or local law concerning apartheid to any contract entered into by a State or local government for 90 days after [October 2, 1986]."

It is apparent that, by its own terms, § 5116's preemptive effect, if any, is limited to state or local procurement legislation which, as applied, might cause a federally funded contract not to be awarded to the lowest bidder. As Professor Tribe observed in a memorandum to Congress, "[t]his leaves the negative implication that investment decisions are not preempted, nor are disbursements not using federal funds." *Memorandum on the Nonpreemptive Effect of the Comprehensive Anti-Apartheid Act of 1986 Upon State and Local Measure,* 132 Cong. Rec. S 12534, 12535 (daily ed., Sept. 15, 1986) (*"Tribe Memorandum"*). In fact, it would be unnecessary to penalize states or localities for applying their own laws if the Anti-Apartheid Act had already invalidated those laws. Consequently, if Congress had intended to preempt state or local anti-apartheid legislation, § 5116 would be superfluous. Thus, despite Senator Lugar's comments, it is hardly clear that the Senate intended to preempt state or local divestment legislation.[47]

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[47] "If a few legislators could insert calculated snippets of legislative history and thereby instruct the courts to regulate the finances of states and cities, they could circumvent the need to articulate that scheme of regulation through the usual legislative process." *Tribe Memorandum, supra,* 132 Cong. Rec. at S 12535. Moreover, Senator Lugar's comments must be balanced against those of Senator Kennedy, the Anti-Apartheid Act's co-author, who forcefully asserted that the statute was to have no preemptive effect. 132 Cong. Rec. § 12533 (daily ed., Sept. 15, 1986).

Moreover, the proceedings in the House of Representatives provide strong evidence that Congress had no intent to preempt. House Resolution 549, which was passed by an overwhelming margin at the same time as the Anti-Apartheid Act, declared that the House intended that the Act not preempt state or local law. The Resolution provided in part:

> " 'Resolved, That in passing the bill, H.R. 4969, as amended by the Senate, it is not the intent of the House of Representatives that the bill limit, preempt, or affect, in any fashion, the authority of any State or local government or the District of Columbia or of any commonwealth, territory, or possession of the United States or political subdivision thereof to restrict or otherwise regulate any financial or commercial activity respecting South Africa.' "[48]

In addition, while speaking in support of the Resolution, numerous Representatives expressed their understanding that the federal statute had no preemptive effect. 132 Cong. Rec. H 6567-6767 (daily ed., Sept. 12, 1986)

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[48] Anticipating a presidential veto, the House leadership had put the Anti-Apartheid Act on an expedited schedule. The bill did not go to conference committee, and Members were not permitted to offer amendments. Thus, the House simply voted on the text of the bill as passed by the Senate. Under these unusual circumstances, the Act's House sponsors drafted the Resolution in order to express their views on the preemption issue. We recognize that the Resolution merely expresses the sense of the House and thus lacks the force and effect of law. We rely on this Resolution, however, insofar as it illustrates the House's understanding that the Act did not preempt state and local divestiture legislation.

(Remarks of Reps. Gray, Leland, Solarz, Weiss, Levine, Rangel, Biaggi, Dixon, and Wheat).

In light of the foregoing legislative history, we cannot conclude that it was the intent of the Congress to preempt state or local legislation such as the Ordinances.

Finally, we consider whether the Ordinances may be preempted because they actually conflict with federal law. As mentioned previously, a conflict occurs when compliance with both the federal law and state law is impossible or where the state law impedes accomplishment of the purposes of the federal law. Courts will not hold that a state law is preempted by conflict where the conflict with federal law is merely potential or speculative. *See, e.g., Exxon Corp. v. Governor of Md., supra,* 437 U.S. at 130-131, 98 S.Ct. at 2216; *Huron Portland Cement Co. v. Detroit,* 362 U.S. 440, 446, 80 S.Ct. 813, 817-818, 4 L.Ed.2d 852 (1960).

In the present case, the Trustees argue that the Ordinances are preempted because they impose inflexible "sanctions" that conflict with the Act's "carrot and stick" approach to South Africa. We disagree. Unlike the federal statute, the Ordinances are not aimed directly at the conduct of the South African government but rather at the conduct of businesses in which the City has investments. The Ordinances do not attempt to impose sanctions on South Africa. Moreover, nothing in the Anti-Apartheid Act suggests that Congress believed that divestment efforts would interfere with its system of sanctions and incentives.

The Trustees also point out that the federal statute does not require American companies to relinquish their

South African holdings; rather, the Act provides only that companies doing business in South Africa must adhere to the Sullivan Principles. *See* §§ 5034-5035. Therefore, the Trustees argue, the Anti-Apartheid Act conflicts with the Ordinances which require the City to divest even from companies complying with the Sullivan Principles. We find no conflict in this regard. The Anti-Apartheid Act does not require that American companies both remain in South Africa and adhere to the Sullivan Principles; it merely prescribes a code of fair employment practices for companies that choose to remain in that country. Consequently, the Anti-Apartheid Act does not contemplate that change can occur in South Africa only if American businesses are affirmatively encouraged to remain there. In fact, some provisions of the Act, such as the prohibition on new investment, may actually discourage businesses from remaining.[49] Therefore, even assuming that the Ordinances may also discourage businesses from remaining in South Africa, they cannot be said to frustrate the narrow congressional objectives underlying the federal Act. *Cf. Nash v. Florida Industrial Comm'n,* 389 U.S. 235, 88 S.Ct. 362, 19 L.Ed.2d 438 (1967).

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[49] Similarly, § 10231(a) of the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203 (1987), amended I.R.C. § 901 (1982) to deny a credit for taxes paid to the South African government. This provision took effect on January 1, 1988, and will remain in force until the Secretary of State certifies that South Africa has met certain requirements set forth in the Anti-Apartheid Act. *See also* 12 U.S.C. § 635(b)(9), which prohibits the Export-Import Bank of the United States from extending credit "in support of any export which would contribute to enabling the Government of South Africa to maintain or enforce apartheid.

VI.

The Trustees and the Intervenors maintain that the Ordinances impermissibly intrude upon the federal government's general authority to determine and carry out the foreign policy of the United States.

The federal government possesses paramount authority to conduct the nation's foreign affairs. *See, e.g., United States v. Pink,* 315 U.S. 203, 233, 62 S.Ct. 552, 567, 86 L.Ed. 796 (1942); *Hines v. Davidowitz,* 312 U.S. 52, 63, 61 S.Ct. 399, 402, 85 L.Ed. 581 (1941). As a consequence, state laws relating to foreign affairs may be unconstitutional, even if they are not preempted by a federal treaty or statute, if the "State's policy may disturb foreign relations." *Zschernig v. Miller,* 389 U.S. 429, 441, 88 S.Ct. 664, 671, 19 L.Ed.2d 683 (1968).[50] Yet, many state laws are

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[50] The question of whether state legislation intrudes upon the dormant foreign relations power is closely related to the question of whether such laws violate the negative implications of Congress's power to regulate foreign commerce. *See* Container Corp. v. Franchise Tax Board, 463 U.S. 159, 194, 103 S.Ct. 2933, 2955, 77 L.Ed.2d 545 (1983) (state tax may place impermissible burden on foreign commerce if it "implicate[s] foreign policy issues which must be left to the Federal Government"). As one author has observed (Note *State and Local Anti-South Africa Action as an Intrusion upon The Federal Power in Foreign Affairs,* 72 Va. L. Rev. 813, 832 (1986)): "Conceptually, and in terms of the evils they address, these two doctrines are distinguishable only in that the commerce clause attack logically seems no more than a slice of the foreign-relations pie. The basic idea behind both, in the context of foreign commerce, is that no subdivision of the Union should be able to act independently so as to affect adversely the whole."

entirely valid even though they "involv[e] matters of significant concern to foreign relations," Restatement (Second) Foreign Relations Law of the United States, § 2 comment d (1965). *See, e.g., Clark v. Allen,* 331 U.S. 503, 516-517, 67 S.Ct. 1431, 1438-1439, 91 L.Ed. 1633 (1947); *Springfield Rare Coin Galleries, Inc. v. Johnson,* 115 Ill.2d 221, 233, 503 N.E.2d 300, 306 (1986); *K.S.B. Tech. Sales Corp. v. North Jersey Dist. Water Supply Comm'n,* 75 N.J. 272, 293, 381 A.2d 774, 784 (1977), *appeal dismissed,* 435 U.S. 982, 98 S.Ct. 1635, 56 L.Ed.2d 76 (1978). *See also De Canas v. Bica,* 424 U.S. 351, 355, 96 S.Ct. 933, 936, 47 L.Ed.2d 43 (1976); *Zschernig v. Miller, supra,* 389 U.S. at 461, 88 S.Ct. at 681 (Harlan, J., concurring); L. Tribe, *American Constitutional Law,* § 4-6, at 230 (2d ed. 1988).[51]

In determining the boundary between permissible and impermissible state legislation, two decisions of the Supreme Court are particularly significant. They are *Clark v. Allen, supra,* 331 U.S. 503, 67 S.Ct. 1431, and *Zschernig v. Miller, supra,* 389 U.S. 429, 88 S.Ct. 664.

In *Clark v. Allen,* the Supreme Court considered a California statute under which a nonresident alien could inherit personal property only if, under the laws of the alien's nation, American citizens had a "reciprocal right"

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[51] The Trustees rely on Bethlehem Steel Corp. v. Board Commissioners, 276 Cal. App.2d 221, 80 Cal.Rptr. 800 (1969), in which an intermediate appellate court held California's "Buy American Act" unconstitutional. As the Supreme Court of New Jersey pointed out, however, the *Bethlehem Steel* case appears to take the incorrect position that "any state statute which in any way touches upon foreign affairs is proscribed," K.S.B. Tech. Sales Corp. v. North Jersey Dist. Water Supply Comm'n, *supra,* 75 N.J. at 293, 381 A.2d at 784

to inherit personal property on the same terms and conditions as the alien's fellow citizens. German legatees, attempting to sustain a testamentary gift from a California resident, argued that the statute was unconstitutional on the ground that California had sought to "promote the right of American citizens to inherit abroad by offering to aliens reciprocal rights of inheritance in California," 331 U.S. at 516-517, 67 S.Ct. at 1439. The legatees argued that this "offer of reciprocal arrangements" was "a matter for settlement by the Federal Government on a nation-wide basis," 331 U.S. at 517, 67 S.Ct. at 1439. The Supreme Court rejected that argument as "far fetched." *Ibid.* Writing for the Court, Justice Douglas observed that rights of succession to property are governed by local law and that no federal treaty preempted the California statute under the circumstances of that case. The Court continued (*ibid.*): "Nor has California entered the forbidden domain of negotiating with a foreign country . . . or making a compact with it contrary to the prohibition of Article I, Section 10 of the Constitution." Thus, the Court upheld the statute, stating (*ibid.*): "What California has done will have some incidental or indirect effect in foreign countries. But that is true of many state laws which none would claim cross the forbidden line."

Twenty-one years later, however, the Supreme Court struck down a similar Oregon law on the ground that the statute's "history and operation" established that it was "an intrusion by the State into the field of foreign affairs," *Zschernig v. Miller, supra,* 389 U.S. at 432, 88 S.Ct. at 666.[52]

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[52] The Oregon statute provided that property claimed by nonresident aliens would escheat unless they could show (389 U.S. at 430-431, 88 S.Ct. at 665):

(Continued on following page)

Again, writing for the Court, Justice Douglas distinguished his opinion in *Clark v. Allen, supra,* reasoning that the prior decision was "concerned with the words of a statute on its face, not the manner of its application," 389 U.S. at 433, 88 S.Ct. at 667. The Court continued (389 U.S. at 433-434, 88 S.Ct. at 667):

> "State courts, of course, must frequently read, construe, and apply laws of foreign nations. It has never been seriously suggested that state courts are precluded from performing that function, albeit there is a remote possibility that any holding may disturb a foreign nation – whether the matter involves commercial cases, tort cases, or some other type of controversy. At the time *Clark v. Allen* was decided, the case seemed to involve no more than a routine reading of foreign laws. It now appears that in this reciprocity area under inheritance statutes, the probate courts of various states have launched inquiries into the type of governments that obtain in particular foreign nations – whether aliens under their law have enforceable rights, whether the so-called 'rights' are merely dispensations turning upon the whim or caprice of government officials, whether the representation of consuls, ambassadors, and other representatives of foreign nations is credible or made

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"(1) the existence of a reciprocal right of a United States citizen to take property on the same terms as a citizen or inhabitant of the foreign county;

(2) the right of United States citizens to receive payment here of funds from estates in the foreign county; and

(3) the right of the foreign heirs to receive the proceeds of Oregon estates 'without confiscation.' "

> in good faith, whether there is in the actual administration in the particular foreign system of law any element of confiscation".

The Supreme Court found in *Zschernig* that the application of the Oregon statute had "led into minute inquiries concerning the actual administration of foreign law," 389 U.S. at 435, 88 S.Ct. at 668. In the course of such inquiries, Oregon courts, along with the courts of other states applying similar statutes, had engaged in extensive critical commentary concerning the nature and conduct of foreign governments. 389 U.S. at 436-439 & nn. 8, 9, 88 S.Ct. at 668-670 & nn. 8, 9.[53] The Court stated that "as construed," the Oregon statute "seem[ed] to make unavoidable judicial criticism of nations established on a more authoritarian basis than our own," 389 U.S. at 440, 88 S.Ct. at 670. The Court held that, because of "its great potential for disruption or embarrassment," the Oregon law had "more than 'some incidental or indirect effect in foreign countries,' " 389 U.S. at 434-435, 88 S.Ct. at 667. In the Court's view, the Oregon statute, as enforced, "affect[ed] international relations in a persistent and subtle way," 389 U.S. at 440, 88 S.Ct. at 670. In reaching this conclusion, the Court recognized, as in *Clark v. Allen, supra,* that the states "have traditionally regulated the descent and distribution of estates," 389 U.S. at 440, 88 S.Ct. at 671. "But," Justice Douglas emphasized, "those regulations must give way if they impair the effective exercise of the Nation's foreign policy." *Ibid.*

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[53] In at least one instance, the application of the Oregon statute had prompted a complaint from a foreign nation. 389 U.S. at 437 n. 7, 88 S.Ct. at 668-669 n. 7.

In explaining the distinction between *Clark v. Allen* and *Zschernig v. Miller*, courts and commentators have focused on the extensive judicial scrutiny and criticism of foreign governments to which the Court referred in the *Zschernig* opinion. *K.S.B. Tech. Sales Corp. v. North Jersey Dist. Water Supply Comm'n, supra*, 75 N.J. at 291-292, 381 A.2d at 784; *Matter of Leikind*, 22 N.Y.2d 346, 352, 292 N.Y.S.2d 681, 685, 239 N.E.2d 550, 553 (1968), *appeal dismissed*, 397 U.S. 148, 90 S.Ct. 990, 25 L.Ed.2d 182 (1970); *Gorun v. Fall*, 287 F.Supp. 725, 728 (D. Mont. 1968), *aff'd*, 393 U.S. 398, 89 S.Ct. 678, 21 L.Ed.2d 628 (1969); Lewis, *Dealing with South Africa: The Constitutionality of State and Local Divestment Legislation*, 61 Tul. L. Rev. 469, 513 (1987); Troyer, Slocombe & Boisture, *Divestment of South Africa Investments: The Legal Implications for Foundations, Other Charitable Institutions, and Pension Funds, supra*, 74 Geo. L. J. at 159. As one group of commentators had observed (Troyer, Slocombe & Boisture, *supra*, 74 Geo. L. J. at 159):

> The fatal flaw in administration of the Oregon nonresident inheritance statute was not that state law touched on foreign affairs, but the detailed, case-by-case judicial inquiries into foreign practices that the law entailed. Therefore, a single, general decision by a state mandating the divestment of state funds arguably would be beyond the scope of *Zschernig*."

Zschernig v. Miller circumscribes, but apparently does not eliminate, a state's ability under certain circumstances to take actions involving substantive judgments about foreign nations.

In the present case, the circuit court concluded that the Baltimore City Ordinances did not unconstitutionally intrude upon the federal government's authority over

foreign affairs. The court reasoned that divestiture "requires no continuing investigation, assessment or commentary by local government officials or employees into the laws or operations of the South African government." We agree. The Ordinances merely represent "a single, general decision" by Baltimore, "mandating the divestment" of the City's pension funds; as such, they are "beyond the scope of *Zschernig*," Troyer, Slocombe & Boisture, *supra*, 74 Geo. L. J. at 159. *See* 69 Op. of Att'y Gen. of Md. 87, 90 (1984) (expressing the view that Code (1985), § 6-208 of the State Finance and Procurement Article, generally prohibiting the deposit of State Funds in financial institutions with loans to the South African government, "does not call for the level of state intrusion found repugnant in *Zschernig*").

Baltimore City's purpose in enacting the Ordinances was simply to ensure that the City's pension funds would not be invested in a manner that was morally offensive to many Baltimore residents and many beneficiaries of the pension funds. In addition, as the circuit court held, the effect of the Ordinances on South Africa is minimal and indirect. A state or local law is not invalid if it has only "some incidental or indirect effect in foreign countries," *Clark v. Allen*, *supra*, 331 U.S. at 517, 67 S.Ct. at 1439; *Zschernig v. Miller*, *supra*, 389 U.S. at 434, 88 S.Ct. at 667. And, as one author observed (Note, *State and Municipal Governments React Against South African Apartheid: An Assessment of the Constitutionality of the Divestment Campaign*, 54 U. Cinn. L. Rev. 543, 574 (1985)): "When a state sells its stock in a corporation doing business in South Africa, it has no immediate effect on foreign relations between South Africa and the United States."

Moreover, in the case at bar, the impact in South Africa is even further diminished because the Ordinances apply only to investments in companies doing a significant amount of business in South Africa and because the City Council included elaborate provisions ensuring that divestiture would only occur at a gradual pace. Finally, the circuit court found "that divestment alone would not cause companies to leave South Africa and that the divestment movement does not create political instability in that country." In sum, the Ordinances' impact in South Africa is clearly minimal.

The Trustees and the Intervenors rely heavily on three cases from other jurisdictions.

In *Springfield Rare Coin Galleries, Inc. v. Johnson, supra,* 115 Ill.2d 221, 503 N.E.2d 300, the Illinois legislature had created an exemption from state occupation and use taxes for coins and currency issued by the United States and any foreign country except South Africa. The Supreme Court of Illinois held that, because the exclusion of South African coins was not "motivated by a legitimate, permissible State purpose," 115 Ill.2d at 232, 503 N.E.2d at 305, the statute violated the Illinois Constitution. *See* 115 Ill.2d at 232, 237, 503 N.E.2d at 305, 307. In reaching this decision, the court reasoned that "the exclusion's sole motivation [was] disapproval of a nation's policies" and that this "create[s] a risk of conflict between nations, and possible retaliatory measures" 115 Ill.2d at 236, 503 N.E.2d at 307. The court further observed that "the exclusion [was] targeted at a single foreign nation." *Ibid*. Finally, the court noted that "the practical effect of the exclusion [was] to impose, or at least encourage, an economic boycott of the South African Krugerrand" and that "regulations which

amount to embargoes or boycotts are outside the realm of permissible State activity," 115 Ill.2d at 236-237, 503 N.E.2d at 307.

New York Times Co. v. City of New York Comm'n on Human Rights, 41 N.Y.2d 345, 346, 393 N.Y.S.2d 312, 313, 361 N.E.2d 963 (1977), involved publication by the *New York Times*, allegedly in violation of New York City's antidiscrimination laws, of advertisements of employment opportunities in South Africa, which merely referred to that country as the situs of employment and did not recite any discriminatory conditions. A plurality of the Court of Appeals of New York stated that the City's Commission on Human Rights could not apply the antidiscrimination law to the newspaper's conduct in that case, since the agency "was without jurisdiction to make and enforce its own foreign policy," 41 N.Y.2d at 352, 393 N.Y.S.2d at 317. The plurality reasoned (41 N.Y.2d at 353, 393 N.Y.S.2d at 318):

> "It was beyond the ken of the city Commission on Human Rights to enforce local antidiscrimination laws by imposing an economic boycott of the Republic of South Africa. In this very case, the commission conducted an inquiry that might have been considered offensive by the Republic of South Africa and which might have been an embarrassment to those charged with the conduct of our Nation's foreign policy. The true danger is that if New York City could do this in one instance, it could do so in many instances. Each locality in each State may not adopt its own foreign policy. This would be disastrous, not only because of multiplicity and divergence of policies, but because local decisions are often influenced

> by pragmatic local considerations which are not necessarily controlling or even relevant to national policy as determined by the Federal Government at Washington."

Finally, in *Tayyari v. New Mexico State University*, 495 F.Supp. 1365 (D.N.M. 1980), the University's regents had moved to deny admission or readmission to any Iranian students until Iran released the Americans whom it held as hostages. The court observed that the State Department had cautioned against the actions such as those of the regents (*Id.* at 1378, quoting affidavit of David D. Newsom, Undersecretary for Political Affairs, U.S. Department of State).[54] In considering whether the University's conduct would "potentially affect" international relations, the court said (*id.* at 1379-1380):

> "Here, Regents' motion is directed at one nation, Iran. Their purpose was to make a political statement about the hostage situation in Iran

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[54] Mr. Newsom had stated as follows:

> "State action directed essentially against Iranians, in response to the hostage crisis, although motivated by a high sense of patriotism and intended to complement federal actions, would potentially impede the conduct of our foreign relations. Such action would constitute a serious unsanctioned state involvement in the conduct of United States foreign policy and international relations. . . . [A] failure to provide Iranian nationals lawfully in this country with fair and nondiscriminatory treatment and the assurance of the equal protection of United States laws could have a negative impact on prospects for securing the early and safe release of the hostages. State actions of this nature will necessarily impair the Federal Government's ability to manage this crisis."

> and to retaliate against Iranian nationals here. The potential effect on international relations *vis-a-vis* Iran is much greater here than with a regulation affecting all aliens regardless of nationality. Attempts to solve the hostage crisis must come from the federal government. State officials in New Mexico must not impede those efforts."

Each of these decisions is distinguishable from the present case. Both *New York Times Co. v. City of New York Comm'n on Human Rights, supra,* and *Springfield Rare Coin Galleries, Inc. v. Johnson, supra,* involved state or local government efforts to structure relationships between its residents on one hand and South Africa or South African nationals on the other. In *New York Times Co.,* New York City attempted to prevent newspapers from accepting employment notices from South African employers. Similarly, in *Springfield Rare Coin Galleries,* Illinois sought to deter coin dealers in that State from contracting to import South African currency. The Baltimore City Ordinances, however, are primarily an attempt by the City to structure its own financial affairs. In calling for divestiture of the City's pension funds, Baltimore did not curtail the rights of South Africa or its citizens or any foreign national. Thus, although the Ordinances might be viewed as having some tangential effect on economic relations between American firms and South African businesses or government, their impact on foreign affairs is far smaller than New York City's action in *New York Times Co., supra,* or that of Illinois in *Springfield Rare Coin Galleries, supra.*

In *Tayyari v. New Mexico State University, supra,* the state action was directly aimed at certain foreign

nationals preventing them from attending a public university. As pointed out above, however, the Baltimore City Ordinances do not curtail the activity of South African nationals or directly affect them. Instead, the Ordinances are aimed at the City's Trustees, telling the Trustees how best to invest City pension funds. In addition, the State Department in *Tayyari* had taken the position that actions like those of the University might impede efforts to win the hostages' release; thus, in that case, there was a strong federal interest in avoiding interference from state measures that went beyond the sanctions already imposed by the national government. Troyer, Slocombe & Boisture, *supra*, 74 Geo. L. J. at 159 n. 125. In the case of divestiture, however, the federal government has not taken the same position.

The question of investment policy for public pension funds is ordinarily governed by local law, and no federal treaty or statute preempts the enactments at issue in this case. Furthermore, in enacting these Ordinances, Baltimore City did not enter "the forbidden domain of negotiating with a foreign country . . . or making a compact with it" in violation of Article I, § 10, of the United States Constitution. *Clark v. Allen, supra,* 331 U.S. at 517, 67 S.Ct. at 1439. Finally, as shown above, the Ordinances have only an incidental or indirect affect in foreign countries. Consequently, we hold that the Ordinances do not intrude upon the federal government's authority to conduct foreign relations.

VII.

The Commerce Clause of the United States Constitution, Art. I, § 8, cl. 3, empowers the Congress "to regulate Commerce with foreign Nations, and among the several States. . . ." The Clause is both an affirmative grant of legislative power to Congress and an implied limitation on the power of state and local governments to enact laws affecting foreign or interstate commerce. *See New Energy Co. of Indiana v. Limbach,* ___ U.S. ___, 108 S.Ct. 1803, 1807, 100 L.Ed.2d 302 (1988); *Cooley v. Board of Wardens,* 12 How. 299, 13 L.Ed. 996 (1851); *Gibbons v. Ogden,* 9 Wheat. 1, 6 L.Ed. 23 (1824); *County Comm'rs of Charles Co. v. Stevens,* 299 Md. 203, 208, 473 A.2d 12, 14 (1984). The aspect of the Commerce Clause which operates as an implied limitation upon state and local government authority is often referred to as the "dormant" or "negative" Commerce Clause.

The Trustees and Intervenors argue that, in violation of this "dormant" aspect of the Commerce Clause, the Baltimore City Ordinances place an impermissible burden on interstate commerce and improperly regulate foreign commerce. The City responds by contending that, in passing the Ordinances, the City is not subject to the scruntiny of the dormant Commerce Clause because the City is functioning as a "market participant." The Trustees and Intervenors reply that the City is not acting as a market participant and that, in any case, the market participant doctrine is inapplicable to foreign commerce.

A.

In adopting the "market-participant doctrine," the Supreme Court has held that, when a state acts as a buyer or seller in a market rather than in its "distinctive governmental capacity," its behavior is not "subject to the limitations of the negative Commerce Clause." *New Energy Co. of Indiana v. Limbach, supra,* 108 S.Ct. at 1809. In other words, "if a State is acting as a market participant, rather than as a market regulator, the dormant commerce clause places no limitation on its activities." *South-Central Timber Devo., Inc. v. Wunnicke,* 467 U.S. 82, 93, 104 S.Ct. 2237, 2243, 81 L.Ed.2d 71 (1984). *See Wisconsin Dept. of Industry v. Gould,* 475 U.S. 282, 106 S.Ct. 1057, 89 L.Ed.2d 223 (1986); *United Bldg. & Constr. Trades Council v. Mayor of Camden,* 465 U.S. 208, 104 S.Ct. 1020, 79 L.Ed.2d 249 (1984); *White v. Mass. Council of Constr. Employers,* 460 U.S. 204, 103 S.Ct. 1042, 75 L.Ed.2d 1 (1983); *Reeves, Inc. v. Stake,* 447 U.S. 429, 100 S.Ct. 2271, 65 L.Ed.2d 244 (1980); *Hughes v. Alexandria Scrap Corp.,* 426 U.S. 794, 96 S.Ct. 2488, 49 L.Ed.2d 220 (1976); *County Comm'rs of Charles Co. v. Stevens, supra,* 299 Md. 203, 473 A.2d 12; L. Tribe, *American Constitutional Law, supra,* § 6-11.

As the Supreme Court explained in *Reeves, Inc. v. Stake, supra,* 447 U.S. at 436-437, 100 S.Ct. at 2277, "the Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace . . . . There is no indication of a constitutional plan to limit the ability of the State themselves to operate freely in the free market." Accordingly, the Supreme Court has held that the Commerce Clause was not implicated when South Dakota adopted a policy under which sales from a state-owned cement plant were

confined to state residents, *Reeves, Inc. v. Stake, supra.* Similarly, this Court has held that the market-participant doctrine shielded a local regulation providing that no trash from outside Charles County's territorial limits could be disposed at the County's publicly owned landfill. *County Comm'rs of Charles Co. v. Stevens, supra.*

The Trustees and Intervenors argue that, even when a State buys, sells, or invests in articles of commerce, the State is a market regulator rather than a market participant unless it has acted in order to " 'favor its own citizens over others,' " (*quoting Hughes v. Alexandria Scrap Corp., supra,* 426 U.S. at 810, 96 S.Ct. at 2498). The Divestiture Ordinances do not purport to favor Baltimore City residents over others. Therefore, the Trustees and Intervenors conclude, the market-participant doctrine is inapplicable.

In the cases in which the Supreme Court and this Court have recognized claims of market participation, the State has largely acted in its own citizens' economic interest and to the disadvantage of citizens of other states. *See, e.g., United Bldg. & Constr. Trades Council v. Mayor of Camden, supra,* 465 U.S. 208, 104 S.Ct. 1020; *White v. Mass. Council of Contr. Employers, supra,* 460 U.S. 204, 103 S.Ct. 1042; *Reeves, Inc. v. Stake, supra,* 447 U.S. 429, 100 S.Ct. 2271; *Hughes v. Alexandria Scrap Corp., supra,* 426 U.S. 794, 96 S.Ct. 2488; *County Comm'rs of Charles Co. v. Stevens, supra,* 299 Md. 203, 473 A.2d 12.

The Supreme Court has not, however, limited the market-participant principle to legislation aimed at economically benefitting a state's own citizens. Courts have applied the market-participant doctrine even when a

State's conduct was not clearly designed to benefit local economic interests at the expense of nonresidents. *See, e.g., Salem Transp. Co. v. Port Authority of N.Y. & N.J.*, 600 F.Supp. 254 (S.D.N.Y. 1985); *Transport Limo. v. Port Authority of N.Y. & N.J.*, 571 F.Supp. 576 (E.D.N.Y. 1983). Similarly, in *K.S.B. Tech. Sales Corp. v. North Jersey Dist. Water Supply Comm'n, supra*, 75 N.J. 272, 381 A.2d 774, the court applied the market-participant doctrine to uphold New Jersey's "Buy American" statute. At best, the law benefitted state residents only indirectly by channelling state funds away from foreign manufacturers and towards American manufacturers, some of whom might have been located in New Jersey.

Language in the Supreme Court's opinions clearly suggests that the market-participant doctrine has a broader sweep than argued for by the Trustees and Intervenors. For example, in *Reeves, Inc. v. Stake, supra*, the Court indicated that the doctrine rests in part on " 'the long recognized right of a trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal,' " 447 U.S. at 438-439, 100 S.Ct. at 2278 (*quoting United States v. Colgate & Co.*, 250 U.S. 300, 307, 39 S.Ct. 465, 468, 63 L.Ed. 992 (1919)). "Moreover," the Court continued, "state proprietary activities may be, and often are, burdened with the same restrictions imposed on private market participants. Evenhandedness suggests that, when acting as proprietors, States should similarly share existing freedoms from federal constraints, including the inherent limits of the Commerce Clause." 447 U.S. at 438-439, 100 S.Ct. at 2278-2279. These broad statements suggest that, just as a private merchant may elect not to

deal with companies doing business in South Africa, the City too may make the same choice unhindered by the constraints of the Commerce Clause.

Furthermore, because the Divestiture Ordinances do not favor local residents at the expense of nonresidents, they pose a smaller threat to the national common market than do the overtly discriminatory measures that, according to the Trustees, the market-participant doctrine sanctions. With regard to state regulatory legislation, the Supreme Court has long recognized that, while discrimination in favor of local economic interests is usually invalid under the Commerce Clause, nondiscriminatory legislation will be upheld unless the burden on interstate commerce outweighs the local interests effectuated by the legislation. *Compare Philadelphia v. New Jersey,* 437 U.S. 617, 624, 98 S.Ct. 2531, 2535, 57 L.Ed.2d 475 (1978), *with Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970). Thus, as to the applicability of the market-participant doctrine, " 'It would be odd indeed to find that when a state becomes less parochial . . . its purpose becomes suspect under the Commerce Clause,' " *Reeves, Inc. v. Stake, supra,* 447 U.S. at 445, 100 S.Ct. at 2281 (*quoting K.S.B. Tech. Sales Corp. v. North Jersey Dist. Water Supply Comm'n, supra,* 75 N.J. at 298, 381 A.2d at 787).

The Trustees and Intervenors rely heavily on the Supreme Court's opinion in *Wisconsin Dept. of Industry v. Gould, supra,* 475 U.S. 282, 106 S.Ct. 1057. In that case, a statute prohibited the state, for a period of three years, from purchasing products manufactured or sold by entities who had been found to have violated the National Labor Relations Act in three separate cases over a five-

year period. Because Wisconsin had provided a "supplemental sanction" that conflicted with Congress's comprehensive plan for labor regulation, the Court held that the National Labor Relations Act preempted the state law. Wisconsin, however, had defended its statute by invoking the market-participant doctrine. While observing that this doctrine applies only where Congress has failed to act and not where Congress has affirmatively legislated, the Court also stated (475 U.S. at 289, 106 S.Ct. at 1062): "We agree with the Court of Appeals, however, that by flatly prohibiting state purchases from repeat labor law violators Wisconsin 'simply is not functioning as a private purchaser of services, . . . '; for all practical purposes, Wisconsin's debarment scheme is tantamount to regulation." Similarly, the Trustees maintain that, by "flatly prohibiting" investments in companies doing business in South Africa, the City has engaged in market regulation as opposed to market participation.

We believe that the Trustees' reliance on the Court's brief remarks in *Gould* is misplaced. Preliminarily, we note that the decision in *Gould* was based on preemption, and the Court clearly held that the market-participant doctrine is inapplicable where state or local action is preempted. Furthermore, the circumstances in *Gould* are clearly distinguishable from those in the present case. The legislation at issue in *Gould* was conceded by the state to be punitive. Repeat labor law violators could not conduct any business with the State for three years. Thus the corporate appellee in Gould could not contract with the State because of "four [National Labor Relations] Board orders against various divisions of the company, . . . none of which [appellee] still owned at the time

of its debarment." *Gould, supra,* 475 U.S. at 285, 106 S.Ct. at 1060. The Baltimore City Ordinances, on the other hand, have the primary purpose of removing a perceived moral taint from the City's investments and not to punish any entity. Furthermore, under the Ordinances, a company suffers no protracted "sanction" of the type employed in *Gould.* A company which ceases to do substantial business with South Africa may immediately "benefit" from the City's investment.

The Trustees' interpretation of *Gould* would conflict with the Supreme Court's recognition that, when a state acts in a proprietary capacity, the Commerce Clause is not concerned with its decisions as to the parties with whom it will or will not deal. *See, e.g., Reeves, Inc. v. Stake, supra,* 447 U.S. at 438-439, 100 S.Ct. at 2278.

The Trustees and Intervenors also rely upon *South-Central Timber Devo., Inc. v. Wunnicke, supra,* involving an Alaska regulation under which a purchaser of state-owned timber was required, as a condition of his contract, to process the timber in Alaska before shipping it outside of that State. In *South-Central Timber,* Justice White, writing for the plurality, stated (467 U.S. at 97-98, 104 S.Ct. at 2245):

> "The limit of the market participant doctrine must be that it allows a State to impose burdens on commerce within the market in which it is a participant, but allows it to go no further. The State may not impose conditions, whether by statute, regulation, or contract, that have a substantial regulatory effect outside of that particular market."

In the plurality's view, Alaska was a market participant in the market for the sale of timber but not in the market for processed timber. Thus, because the State had exerted its economic leverage to affect a market in which it did not participate, it acted as a market regulator.

On the other hand, in *White v. Mass. Council of Constr. Employers, supra,* the Court held that the market-participant doctrine applied when the Mayor of Boston ordered that, on construction projects funded in whole or in part with City funds, at least 50% of the work force should be composed of Boston residents. Thus, the *White* Court permitted the City of Boston to use its economic leverage over public contractors in order to limit the contractors' discretion as to the parties with whom they might deal. In reaching this decision, the Court reasoned that the City's action "cover[ed] a discrete, identifiable class of economic activity in which the city [was] a major participant." 460 U.S. at 211 n. 7, 103 S.Ct. at 1046 n. 7. Moreover, the Court continued, "[e]veryone affected by the order [was], in a substantial if informal sense, 'working for the city.' " *Ibid.* In *South-Central Timber, supra,* the Court distinguished *White* as follows (467 U.S. at 99, 104 S.Ct. at 2246):

> "In contrast to the situation in *White*, this restriction on private economic activity takes place after the completion of the parties' direct commercial obligations, rather than during the course of an ongoing commercial relationship in which the city retained a continuing proprietary interest in the subject of the contract."

We think that the present case is more like the situation in *White* than that in *South-Central Timber.* The City's

ownership of a security gives rise to "an ongoing commercial relationship in which the city retain[s] a continuing proprietary interest" in the firm in which it invests. Thus, the City is not imposing conditions which have a substantial regulatory effect outside of the market in which it is participating.

B.

The Supreme Court has expressed no opinion as to whether the market-participant doctrine applies to state conduct affecting foreign commerce. *Reeves, Inc. v. Stake, supra,* 447 U.S. at 438 n. 9, 100 S.Ct. at 2278 n. 9. *See also South-Central Timber Devo., Inc. v. Wunnicke, supra,* 467 U.S at 96, 104 S.Ct. at 2245. The considerations underlying the restraints on state power to burden foreign commerce are distinct from the considerations underlying the restraints on state authority to burden interstate commerce. Also, a "more extensive constitutional inquiry is required" when applying the foreign Commerce Clause. *Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434, 446, 99 S.Ct. 1813, 1820, 60 L.Ed.2d 336 (1979).

As noted previously, however, the concerns which underlie the foreign Commerce Clause are closely related to the concerns underlying the limits on a state's authority to affect foreign policy. The purpose behind both limitations is to prevent individual states from adversely affecting relations with foreign countries that are properly coordinated on a national level. In the circumstances of this case, application of the market-participant doctrine to state conduct affecting foreign commerce does no violence to this goal. As discussed in Part VI of this

opinion, the Ordinances are not inconsistent with national policy. There is no clear evidence that the federal government views local divestiture efforts as conflicting with national foreign policy.

Some authorities have taken the position that the market-participant doctrine would be applicable in foreign commerce cases. For example, in *K.S.B. Tech Sales Corp. v. North Jersey Dist. Water Comm'n, supra,* 75 N.J. 272, 381 A.2d 774, the Supreme Court of New Jersey used the market-participant doctrine to uphold New Jersey's "Buy-American" Statute, which generally required the use of American products in projects funded by the state. The New Jersey court recognized that "some differences between interstate and foreign commerce exist," but saw no need "to differentiate between the two" in the factual context of that case. 75 N.J. at 300, 381 A.2d at 788.

In *Carll v. S. C. Jobs-Economic Devel. Authority,* 327 S.E.2d 331 (S.C. 1985), the Supreme Court of South Carolina upheld a statute which provided capital and management assistance to certain South Carolina enterprises against a challenge that the legislation interfered with interstate and foreign commerce. The Court held: "The Commerce Clause does not prohibit implementation of any portion of this Act because South Carolina is a market participant and is entitled to establish guidelines for its participation regardless of the effect on interstate or foreign commerce." 327 S.E.2d at 337.

Similarly, the Attorney General of Maryland, in a letter to the Governor, expressed the opinion that the market-participant exception applied to Code (1985), § 6-208 of the State Finance and Procurement Article,

which generally prohibits the State from depositing its funds in financial institutions with loans in South Africa. 69 Op. of the Att'y Gen. of Md., *supra,* at 88-89. In reaching this conclusion, the Attorney General emphasized that the statute embodied the State's decision concerning "where to deposit its own funds." *Ibid.*

Finally, we note that a leading contemporary treatise on constitutional law specifically states that, despite their effect on foreign commerce, divestiture statutes and ordinances fall within the market-participant doctrine:

> "A distinction must be drawn between state regulation of foreign commerce, and state participation in foreign commerce. The former activity is tightly proscribed by the negative implications of what might be called the foreign commerce clause. Thus, a state or local government that opposed the regime of apartheid in the Union of South Africa could not, absent congressional authorization, enact a measure denying South African companies the privilege of doing business within its jurisdiction; nor could a state or locality forbid its citizens and resident corporations from investing in or trading with multinational corporations which have affiliates or subsidiaries in South Africa. But under the Supreme Court's market participant exception to the commerce clause, a state would be free to pass laws forbidding investment of the state's pension funds in companies that do business with South Africa, or rules requiring that purchases of goods and services by and for the state government be made only from companies that have divested themselves of South African commercial involvement."

L. Tribe, *American Constitutional Law, supra,* § 6-21, at 469.

While a few authors have reached a contrary conclusion,[55] we are persuaded that, in mandating the divestment of municipally administered pension funds, the City of Baltimore acted as a market participant even though its actions had consequences for foreign commerce. Unlike the examples of market regulation set forth in Professor Tribe's treatise, the Ordinances do not attempt to interfere with private, commercial transactions between persons engaged in foreign commerce. Rather, the Ordinances simply represent Baltimore City's decision concerning the proper way of investing funds which the City has the authority to administer and which therefore "belong" to the City, although as a trustee. *See* 69 Op. of the Att'y Gen. of Md., *supra*, 88-89. Moreover, in light of the particular circumstances of this case, we see no reason why a different result should obtain simply because the Ordinances may affect both interstate and foreign commerce. *See K.S.B. Tech. Sales Corp. v. North Jersey Dist. Water Comm'n, supra*, 75 N.J. at 300, 381 A.2d at 788; *Carll v. S.C. Jobs - Economic Devel. Authority, supra*, 327 S.E.2d at 337. Consequently, we hold that, under the market-participant doctrine, the Ordinances do not violate the negative implications of Congress' power to regulate foreign commerce.

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[55] Lewis, *Dealing With South Africa: The Constitutionality of State and Local Divestment Legislation*, 61 Tul. L. Rev. 469, 478-487 (1987); Note, *State and Local Anti-South Africa Action as an Intrusion upon The Federal Power in Foreign Affairs, supra*, 72 Va. L. Rev. at 838-841.

C.

Even if the Ordinances were not exempt from Commerce Clause scrutiny because of the market-participant doctrine, we believe that they would survive such scrutiny.

(1)

In *Pike v. Bruce Church, Inc., supra,* the Supreme Court set forth the test for determining the constitutionality of state or local laws affecting interstate commerce (397 U.S. at 142, 90 S.Ct. at 847):

> "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 443, 80 S.Ct. 813, 816 4 L.Ed.2d 852. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."

In *Maine v. Taylor,* 477 U.S. 131, 106 S.Ct. 2440, 91 L.Ed.2d 110 (1986), the Supreme Court clarified when the *Pike v. Bruce Church* test is applicable, noting that when evaluating the constitutionality of state laws affecting interstate commerce, the appropriate standard to be

applied depends on whether the statute's effect on interstate commerce is incidental or whether the statute affirmatively discriminates against interstate commerce. The Court stated (477 U.S. at 138, 106 S.Ct. at 2447):

> "In determining whether a State has overstepped its role in regulating interstate commerce, this Court has distinguished between state statutes that burden interstate transactions only incidentally, and those that affirmatively discriminate against such transactions. While statutes in the first group violate the Commerce Clause only if the burdens they impose on interstate trade are 'clearly excessive in relation to the putative local benefits,' *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970), statutes in the second group are subject to more demanding scrutiny. The Court explained in *Hughes v. Oklahoma*, 441 U.S. 322, 336, 99 S.Ct. 1727, 1736, 60 L.Ed.2d 250 (1979), that once a state law is shown to discriminate against interstate commerce 'either on its face or in practical effect,' the burden falls on the State to demonstrate both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by available nondiscriminatory means."

See, e.g., Sporhase v. Nebraska Ex Rel. Douglas, 458 U.S. 941, 955-956, 102 S.Ct. 3456, 3464, 73 L.Ed.2d 1254 (1982); *Hughes v. Oklahoma*, 441 U.S. 322, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979); *Exxon Corp. v. Governor of Maryland, supra*, 437 U.S. at 126, 98 S.Ct. at 2214; *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 97 S.Ct. 2434, 2445, 53 L.Ed.2d 383 (1977); *Dean Milk Co. v. City of Madison, Wis.*, 340 U.S. 349, 354, 71 S.Ct. 295, 298, 95 L.Ed. 329 (1951).

There has been no showing that the Ordinances, either facially or in purpose and effect, favor residents of the City of Baltimore or the State of Maryland over residents of any other State. They apply even-handedly. The divestiture provisions are applicable to all firms in which the City might wish to invest, wherever those firms might be located. In enacting the Ordinances, the City Council clearly did not intend to secure economic advantages for local businesses at the expense of businesses situated elsewhere. *Compare, e.g., Dean Milk Co. v. City of Madison, Wis., supra,* 340 U.S. 349, 71 S.Ct. 295.[56]

Therefore, under *Pike v. Bruce Church, supra,* we must inquire whether the incidental burden on interstate commerce caused by divestment is "clearly excessive" in relation to the City's legitimate local interests.

In our opinion, it is indisputable that the Ordinances effectuate legitimate, local public interests. The divestiture provisions respond to the local interest in managing

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[56] The Intervenors, citing Milk Control Bd. v. Eisenberg Farm Prods., 306 U.S. 346, 59 S.Ct. 528, 83 L.Ed. 752 (1939), suggest that the Ordinances are discriminatory because they "block or impair the commerce of certain companies based upon the location of their operations." (Brief at p. 24). The Intervenors, however, fail to recognize that, under the principle they invoke, the location of operations is relevant only to the extent that a State discriminates against out-of-state businesses and in favor of in-state businesses. *See generally,* Tribe, *American Constitutional Law, supra,* §§ 6-6 to 6-9, 6-17. To show "discrimination" against companies doing business in South Africa is not necessarily the same as showing discrimination in favor of local interests. Lewis, *Dealing With South Africa: The Constitutionality of State and Local Divestment Legislation, supra,* 61 Tul. L. Rev. at 493-494.

the City's finances and in ensuring the pension funds are invested in the socially responsible manner. They permit the City and its citizens to distance themselves from the moral taint of co-venturing in firms that, in the view of many, help to maintain South Africa's system of racial discrimination. Finally, they express the City's sensitivity to the deep feeling of its citizenry on this matter of fundamental human dignity.

The Trustees and Intervenors argue that by requiring the sale of hundreds of millions of dollars of investment portfolios, with the intended effect of forcing corporations to withdraw from business operations in and with South Africa, the Ordinances substantially burden interstate commerce. While we do not dispute that the Ordinances impose some burden on interstate commerce, in our opinion that burden is not excessive in relation to the benefits. The Ordinances embody the City's moral condemnation of racial discrimination. The use of pension funds arguably to support racial discrimination in South Africa is an issue of deep concern, not only to the pension systems' members and beneficiaries but also to all citizens of Baltimore who are sensitive to slavery's persistent legacy. In our judgment, the Ordinances' burden on the interstate sale of securities does not outweigh these unique and profound local concerns.

Urging a contrary conclusion, the Trustees argue (Brief at p. 50) that the Ordinances "are not the least intrusive means of accomplishing their claimed purpose." *See A&P Tea Co. v. Cottrell*, 424 U.S. 366, 372-373, 96 S.Ct. 923, 928-929, 47 L.Ed.2d 55 (1976); *Pike v. Bruce Church, Inc., supra*, 397 U.S. at 142, 90 S.Ct. at 847; *Dean Milk Co. v. City of Madison, Wis., supra*, 430 U.S. at 354, 71 S.Ct. at 298.

According to the Trustees, the City might have promoted its interests with a lesser impact on interstate activities had the Ordinances allowed investments in companies achieving satisfactory progress ratings under the Sullivan Principles.[57] The Trustees, however, stipulated that in South Africa a number of important black organizations and leaders, including Archbishop Desmond Tutu, favor divestiture and oppose the Sullivan Principles. Furthermore, Mr. Hauck, the Trustees' expert, conceded that, in light of the political situation in South Africa, with press restrictions and the successive states of emergency, there no longer existed a "window of opportunity" for American businesses to promote changes in the apartheid system. The City was, therefore entitled to conclude that a plan of divestment based on the Sullivan principles was insufficient.

In a separate argument the Intervenors assert that the Ordinances create a "blockage" of interstate commerce by preventing the Trustees from entering the interstate securities market to purchase the stocks and bonds of companies doing business in South Africa. We disagree that this "blockage" represents a cognizable burden on interstate commerce.

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[57] The Trustees also maintained (Brief at 50) that, by virtue of their incorporation of the Africa Fund's broad "doing business" standard, the Ordinances "represent the most instrusive divestiture scheme in the United States." We have held, however, that the Trustees are not bound by the Africa Fund's list. Consequently, we need not address this contention by the Trustees.

The Commerce Clause does not protect particular interstate firms; it protects the interstate market as a whole. As the Supreme Court stated in *Exxon Corp. v. Governor of Maryland, supra,* 437 U.S. at 127, 98 S.Ct. at 2214, "interstate commerce is not subjected to an impermissible burden simply because an otherwise valid regulation causes some business to shift from one interstate supplier to another." Thus, contrary to the Intervenors' argument, the Ordinances are not invalid merely on the ground that divestiture requires the Trustees to shift the City's investments away from some interstate firms and towards others.

In light of the foregoing, we hold that the Ordinances satisfy the criteria of *Pike v. Bruce Church, Inc., supra,* and do not place an impermissible burden on interstate commerce.

(2)

As previously discussed, state conduct is undoubtedly subject to more intensive Commerce Clause scrutiny when it affects foreign as opposed to interstate commerce. *See Japan Line, Ltd. v. County of Los Angeles, supra,* 441 U.S. at 446, 99 S.Ct. at 1820; L. Tribe, *American Constitutional Law, supra,* § 6-21, at 469. Nevertheless, Congress's power over foreign commerce is not completely exclusive. As the Supreme Court stated in *Bob-Lo Excursion Co. v. Michigan,* 333 U.S. 28, 37-38, 68 S.Ct. 358, 363, 92 L.Ed. 455 (1948):

> "It is far too late to maintain that the states possess no regulatory powers over such commerce. From the first meeting of Congress they have regulated important phases of both foreign

> and interstate commerce, particularly in relation to transportation by water, with Congress' express consent. And without such consent for nearly a hundred years they have exercised like power under the local diversity branch of the formula announced in *Cooley v. Board of Wardens,* 12 How. 299. See *Union Brokerage Co. v. Jensen,* 322 U.S. 202; *Kelly v. Washington,* 302 U.S. 1 and authorities cited in both cases. Indeed the *Cooley* criterion has been applied so frequently in cases concerning only commerce among the several states that it is often forgotten that that historic decision dealt indiscriminately with such commerce and foreign commerce."

In *Japan Line, Ltd. v. County of Los Angeles, supra,* the Supreme Court stressed that the States may not "impair federal uniformity in an area where federal uniformity is essential," 441 U.S. at 448, 99 S.Ct. at 1821, or prevent "the Federal Government from 'speaking with one voice' in international trade," 441 U.S. at 453, 99 S.Ct. at 1824.

The Trustees and Intervenors seem to argue that the United States cannot "speak with one voice" unless only one voice, that of the federal government, is allowed to speak. In *Container Corp. v. Franchise Tax Board,* 463 U.S. 159, 194, 103 S.Ct. 2933, 2955, 77 L.Ed.2d 545 (1983), however, the Supreme Court established that, even when state legislation relates to questions of foreign policy, the legislation violates the negative implications of the foreign Commerce Clause only "if it either implicates foreign policy issues which must be left to the Federal Government or violates a clear federal directive." Essentially for reasons previously set forth in this opinion, the Ordinances clearly appear to be valid under this test.

The Tiustees and the Intervenors, however, contend that the Ordinances prevent the Nation from "speaking with one voice" because divestiture is likely to offend South Africa and lead it to retaliate not only against Baltimore but "against the Nation as a whole," *Container Corp., supra,* 463 U.S. at 194, 103 S.Ct. at 2955. Retaliation, they argue, is all the more likely in this case because the Ordinances are concerned with a specific foreign nation rather than foreign commerce in general.

In our view, the likelihood of retaliation would appear to be remote, given the record in this case and the absence of any clear indication from the federal government that divestment legislation interferes with the Nation's foreign policy.[58] *See also* Note, *State and Municipal Governments React Against South African Apartheid: An Assessment of the Constitutionality of the Divestment Campaign, supra,* 54 U. Cinn. L. Rev. at 563 ("Nearly twenty years after the beginning of the divestment campaign, South Africa has not evinced any intent to retaliate . . . South Africa's inaction appears to validate the notion that South Africans 'will endure rather substantial economic damage before they would . . . countersanction the United States.' ") Indeed, despite their far broader impact on trade between the United States and South Africa, congressional sanctions have not provoked the type of retaliation feared by the Trustees and the Intervenors. Consequently, we cannot conclude that the Ordinances "might justifiably lead to significant foreign

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[58] The evidence before the circuit court showed that divestment has been a negligible factor in companies' decisions to leave South Africa.

retaliation," *Container Corp., supra,* 463 U.S. at 194, 103 S.Ct. at 2955.

Finally, we disagree with the Trustee and Intervenors that the City's voice, as expressed in the Ordinances, undermines the federal government's ability to prescribe uniform regulations governing trade with South Africa. By virtue of their moral condemnation of apartheid, the Ordinances are "broadly consistent" with federal policy towards South Africa, as embodied in the Anti-Apartheid Act. *See* Tribe Memorandum, *supra,* 132 Cong. Rec. § 12535; Lewis, *supra,* 61 Tul.L.Rev. at 502-503. Thus, although the substance of the Ordinances may differ from that of the federal statute, the underlying message of both is the same. Furthermore, as repeatedly mentioned, the federal government has not taken the position that divestment legislation interferes with the Nation's ability to achieve its foreign policy objectives.

For the foregoing reasons, we hold that the Baltimore City Ordinances do not violate the Commerce Clause of the United States Constitution.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY MODIFIED SO AS TO GRANT THE MOTION FOR INTERVENTION AND TO REFLECT THE VIEWS SET FORTH IN THIS OPINION, AND AS MODIFIED, AFFIRMED. IN NO. 95, COSTS TO BE PAID BY THE BOARDS OF TRUSTEES. IN NO. 104, ONE-HALF OF THE COSTS TO BE PAID BY THE APPELLANTS AND ONE-HALF OF THE COSTS TO BE PAID

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BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.

APPENDIX E

THE BOARD OF TRUSTEES OF THE EMPLOYEES' RETIREMENT SYSTEM OF THE CITY OF BALTIMORE, et al	*	IN THE CIRCUIT COURT FOR BALTIMORE CITY
Plaintiffs	*	CASE NO. 86365065/CE-59858
v.	*	
MAYOR AND CITY COUNCIL OF BALTIMORE CITY	*	
Defendant	*	

* * * * * * * * * *

OPINION AND ORDER

GREENFELD, J.

Pursuant to the Maryland Uniform Declaratory Judgments Act, Md. Cts. and Jud. Proc. Code (1984 Repl. Vol.) §§3-401, *et seq*. the Plaintiffs seek a declaratory judgment that 1986 Ordinance Nos. 765 and 792 ("the Ordinance" or "the Divestiture Ordinance of the Mayor and City Council of Baltimore ("the City" or "the Defendant") are invalid. The Plaintiffs are the Boards of Trustees ("the Trustees") of the three City retirement systems ("the Retirement Systems" or "the Systems") [the Employees' Retirement System, the Fire and Police Employees' Retirement System, and the Elected Officials' Retirement System] as well as an active City employee who contributes to the Systems and a retired City employee who receives retirement benefits from the System.

The Ordinance and the Preceding Resolution

In 1985 the City Council adopted non-binding Resolution 42 urging the Trustees to disinvest from companies doing business in South Africa. (This Resolution and the Ordinance apply to South Africa and Namibia, but the parties have agreed to limit the discussion in this suit to South Africa only.) The Resolution provided as follows:

> WHEREAS, The policy of apartheid as maintained by the present government of the Republic of South Africa is not only morally repugnant to all who believe in the inherent rights of individual freedom and equal treatment under the law and has resulted in the systematic enslavement and subjugation of the non-white majority of South Africa and Namibia, but also the continuance of the policy casts doubt on the safety and stability of investments in companies doing business with, operating in or making loans to the Republic of South Africa or Namibia; and
>
> WHEREAS, We recognize that the investment of American and foreign capital in South Africa or Namibia lends support to those governments and their economies, thus contributing to the maintenance and enforcement of apartheid, and we are particularly concerned about the extent to which the investments of the City's pension funds support and sustain the abhorrent policy of apartheid; and
>
> WHEREAS, The Boards of Trustees of the Employees' Retirement System, the Fire and Police Employees' Retirement System and the Elected Officials Retirement System have a fiduciary responsibility to manage the assets of those retirement systems prudently, as well as in a manner consistent with sound public policy; now, therefore,
>
> SECTION 1. *Be it resolved by the Mayor and City Council of Baltimore,* That it is its intention to immediately proceed with the process of disinvesting all monies held

in trust by the City retirement systems from the stocks, securities or other obligations of any company or subsidiary or affiliate doing business in South Africa or Namibia and to carry out this divestiture with responsible fiscal prudence;

SEC. 2. *And be it further resolved,* That the Boards of Trustees of the City's retirement systems shall, within 30 days of the passage of this resolution, provide to the Mayor and to the City Council a schedule of investments in companies and corporations doing business in or lending money to South Africa and Namibia;

SEC. 3. *And be it further resolved,* That the Boards of Trustees of the City's retirement systems shall, within 90 days of the passage of this resolution, present to the Mayor and to the City Council an investment proposal designed to encourage the United States and foreign corporations whose securities are held in the portfolios of those retirement systems to improve their treatment of their non-white employees in South Africa and Namibia and take other tangible steps in substantial opposition to apartheid.

Unsatisfied with the Trustees' response to the Resolution, the Ordinance was adopted. (There was some doubt whether Ord. No. 765 applied to the Elected Officials' Retirement System; therefore, Ord. No. 792 was passed to resolve the uncertainty.) The divestiture provision in Section 1 of the Ordinance provides, in pertinent part, as follows:

> (i) . . . No monies or other funds under any provision of the Retirement System shall remain invested or hereinafter be invested in the stocks, securities or other obligations of any bank or financial institution which makes loans to the Republic of South Africa or Namibia, or in the stocks, securities, or other obligation of any company doing business in or with the Republic of South Africa or Namibia, or whose subsidiary

or affiliate does business in or with the Republic of South Africa or Namibia.

(ii) Business entities doing business in or with the Republic of South Africa shall be identified by reference to the most recent annual report of the African [*sic*] Fund entitled "Unified List of United States Companies with Investments or Loans in South Africa and Namibia".

The Ordinance provides for the implementation of divestiture as follows:

SEC. 2 *And be it further ordained,*

(a) that, subject to the provisions of this section, the divestiture required by section 1 of this Ordinance shall be completed within the time limit established in this Ordinance.

(b) that the time limit shall begin on the first day of the third quarter of fiscal year 1987.

(c) that during the time limit the Boards of Trustees of the Retirement Systems shall make quarterly reports to the Mayor and City Council concerning the progress of divestiture.

(d) that, during the time limit, the Boards of Trustees of the Retirement Systems may from time to time suspend the divestiture program provided the suspending board adopts a Resolution pursuant to this section.

(e) that when a Board of Trustees of either Retirement System adopts a Resolution suspending the divestiture program under this section, the suspending board shall find as follows:

(1) that the rate of return on the funds are substantially lower than the average of the annual earnings on the funds over the past five years, and

(2) that continued divestiture under this Ordinance will be inconsistent with generally accepted investment standards for conservators of pension funds notwithstanding the intent of this Ordinance, or

(3) that divestiture under the divestiture program will cause financial losses to the funds.

(f) that when a Board of Trustees of the Retirement Systems adopts a resolution suspending the divestiture program under this section, the resolution shall:

(1) state the standards and conclusions for the suspension;

(2) set forth the duration of the suspension and the time of resumption of the divestiture program; however, the period of suspension shall not exceed 90 days and the time limit shall be tolled for the period of suspension; and

(3) be in writing and shall be sent to the Mayor, President of the City Council, and the Department of Legislative Reference.

SEC. 3 *And be it further ordained* that the time limit for divestiture under this Ordinance is 2 years.

Preliminary Statement

The Plaintiffs' contentions involve six subject categories: (1) Interpretative Questions and Delegation of Powers; (2) Interstate Commerce Clause; (3) Federal Power to Conduct Foreign Policy; (4) Foreign Commerce Clause; (5) Federal Preemption; and (6) Impairment of Contract. The first five issues were presented by the Plaintiffs' motion for summary judgment, Defendant's

response thereto, and the accompanying exhibits. Plaintiffs' motion for summary judgment was denied on the sixth issue, and voluminous evidence on it was thereafter presented at trial. The parties have agreed that the trial testimony of Mr. Daniel Purnell and Mr. David P. Hauck can be considered as to all six issues. The summary judgment motion is now moot, since the issues it raised will be decided in this opinion and then merged into the final declaratory judgment.

Since the findings of fact on any one issue in this case usually have relevance only to that issue, the findings of fact will be stated in that part of the opinion discussing that particular issue.

The scope of the Ordinance should be clarified at the outset. By its terms, the Ordinance applies to *any* company doing South Africa business, but the Baltimore City Code permits pension fund investments only in American or Canadian companies. Art. 22, §7(a)(6) and §35(a)(6). However, the Plaintiffs' Investment Guidelines permit investments in foreign securities listed on major U.S. securities exchanges "via ADR's." By this method, an American bank will purchase stock of a foreign company on a foreign exchange and issue American Depository Receipts (ADR's) to U.S. investors, who thereby become beneficial owners of the foreign company's stock. Even if this investment is not prohibited by the City Code, the parties agree that the inclusion or exclusion of ADR's does not significantly affect the issues or conclusions in this case; and the same is true as to investments in Canadian companies.

1. Interpretative Questions and Delegation of Powers

The Plaintiffs contend that there are ambiguities in the Ordinance pertaining to the scope and application of the suspension power and the required use of the Africa Fund Unified List. The provisions in the Ordinance questioned by the Plaintiffs are fairly clear:

1. The power to suspend the divestiture program applies not only to the requirement that existing holdings be sold, but also to the prohibition against new investments. Therefore, during a suspension period, the Trustees may retain investments in companies doing business in South Africa and make new investments in such companies.

2. The "time limit" for total divestiture is two years from January 1, 1987. A suspension increases that "time limit" for a period equal to the length of the suspension. There can be any number of suspensions imposed by the Trustees provided, of course, that the requisite findings are made for each suspension.

3. A suspension is available at any time within the "time limit" (two years plus any suspension time), even if total divestment has already occurred.

4. To invoke suspension, a particular board of trustees must make a separate determination for its own retirement system. The rate of return on the retirement funds of all three systems cannot be aggregated for determining the availability of suspension. Each retirement fund must be treated separately.

5. The Ordinance prohibits investments in companies "doing business" in or with South Africa. The

directive in the Ordinance that these companies "shall be identified by reference to the most recent annual report" of the Africa Fund Unified List does not mean that the Unified List must be followed blindly by the Trustees. The Unified List is merely a "reference," which the Trustees may accept or reject. Ultimately, the Trustees are the final authority to determine whether a company is disqualified. Indeed, the Unified List itself cautions its users that

> "The connections that corporations and banks have with southern Africa are constantly in flux. Thus this list should be used as a <u>starting point</u> for further investigation [emphasis supplied]. Before taking final divestment action <u>users of the Unified List should seek confirmation from the companies themselves</u> [emphasis in original], especially where an investment portfolio held in trust is concerned."

It is highly unlikely that the City Council could have intended to bar independent inquiry by the Trustees in determining qualified companies, especially where the Unified List itself urges such action. The Plaintiffs correctly point out that if the Ordinance prevents independent Trustee determination as to what company is "doing business" in or with South Africa, that provision would be void as an unconstitutional delegation of legislative power to the Africa Fund, which compiles the Unified List. *Commission on Medical Discipline vs. Stillman,* 291 Md. 390 (1981). However, if the government official has the final say, the delegation is valid. *State v. Ciciarelli,* 55 Md. App. 150 (1983). It is an elemental principle of statutory construction that a statute or ordinance will, if reasonably possible, be so construed as to render it constitutional in

preference to a construction which would invalidate it. See *City of College Park v. Cotter*, ___ Md. ___, No. 148, Sept.Term, 1986, slip op. at 18 (filed June 3, 1987) and M.L.E., Constitutional Law, §75 for a citation of numerous other Maryland cases applying this principle. The construction resulting in constitutionality is more than reasonable and is adopted here.

2. *The Interstate Commerce Clause*

The Plaintiffs contend that the Ordinance violates the Interstate Commerce Clause of the United States Constitution, Art. 1, §8, cl.3, because it places an unreasonable burden on the interstate sale of securities of numerous corporations while serving no legitimate local public interest. The short answer to this contention, even if *arguendo* its premises are assumed to be true, is that the "market participant" doctrine excepts the City from the strictures of the Commerce Clause. *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204 (1983); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980); and *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976). The rationale for this doctrine was stated in *Reeves* (447 U.S. at 436-439):

> The basic distinction drawn in *Alexandria Scrap* between States as market participants and States as market regulators makes good sense and sound law. As that case explains, the Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace . . . There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market . . . Restraint in this area is also counseled by considerations of state sovereignty, the role of each state " 'as guardian and

> trustee for its people,' " . . . and "the long recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." [Citations omitted.] Moreover, state proprietary activities may be, and often are, burdened with the same restrictions imposed on private market participants. Evenhandedness suggests that, when acting as proprietors, States should similarly share existing freedoms from federal constraints, including the inherent limits of the Commerce Clause . . .

White succinctly summarized the doctrine (460 U.S. at 208):

> *Alexandria Scrap* and *Reeves,* therefore, stand for the proposition that when a state or local government enters the market as a participant it is not subject to the restraints of the Commerce Clause.

The market participant doctrine clearly applies here. The City, through the Trustees, has entered the market as a purchaser and seller of corporate securities which are freely traded in interstate commerce. As a market participant the City, just like a private investor, can decide with whom it will deal without impinging upon the restraints of the Commerce Clause.

The Plaintiffs rely heavily on *Wisconsin Dept. of Industry v. Gould, Inc.,* 475 U.S. ___, 106 S.Ct. 1057 (1986). That case involved a Wisconsin statute which forbade the State from doing business with certain repeat violators of the National Labor Relations Act. The statute was invalidated because it encroached on an area preempted by the federal labor law. In its decision, the Supreme Court rejected Wisconsin's market participant status, holding that the

State was not functioning simply as a private purchaser of services, but "for all practical purposes, Wisconsin's debarment scheme is tantamount to regulation." *Id.* at 1063. No explanation is given as to why the Wisconsin statute was deemed to be more regulatory than those laws involved in *Alexandria Scrap Reeves* and *White*. Indeed, the *Alexandria Scrap* statute, which was designed to "protect the State's environment" (426 U.S. at 809), is far more regulatory than the Divestiture Ordinance. In any event, the statements in *Gould* relied upon by the Plaintiffs appear merely to be *dictum*, for the decision rests primarily on the concept of federal preemption (*e.g.*, "What the Commerce Clause would permit States to do in the absence of the NLRA is thus an entirely different question from what States may do with the Act in place." 106 S.Ct. at 1063). *Gould* is not compellingly applicable here. The Divestiture Ordinance does not violate the Interstate Commerce Clause of the United States Constitution.

3. *Federal Power to Conduct Foreign Affairs*

The Plaintiffs also contend that the Ordinance has a direct impact on the relations between the United States and South Africa and as such, conflicts with the exclusive power of the United States Government to conduct the foreign affairs of the nation. The Plaintiffs succinctly state the proposition thusly:

> "The effects of the Ordinance on the foreign affairs of the United States is both direct and significant. The Ordinance singles out one nation, condemns its internal policies, and penalizes it. No matter how morally right the

> Defendant's decision may be, the Constitution of the United States simply does not permit the City to make decisions about the morality of the actions of foreign governments and then pass enactments that have a direct economic effect on those governments." (Plaintiffs' Reply Memorandum, p. 36.)

It is well settled that the Federal Government "is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties." *Hines v. Davidowitz,* 312 U.S. 52, 63 (1941). See also *Curtiss-Wright Export Corp.,* 299 U.S. 304, 318 (1936). The broad scope of the Federal foreign affairs power permits, nevertheless, local legislation which may have "some incidental or indirect effect in foreign countries." See *Clark v. Allen,* 331 U.S. 503, 517 (1947), cited with approval in *Zschernig v. Miller,* 389 U.S. 429, 433, 434 (1968). And more recently, in the context of the Foreign Commerce Clause, *infra,* it has been recognized that a state tax is valid if it has "foreign resonances, but does not implicate foreign affairs." *Container Corp v. Franchise Tax Bd.* 463 U.S. 159, 194 (1983), *reh. den.* 464 U.S. 909 (1983). The Plaintiffs place primary reliance on *Zschernig.* That case involved an Oregon statute which provided for escheat of claims of nonresident aliens if a United States citizen did not have a reciprocal right of inheritance in the country of the claiming foreign heir, or if inheritance by the nonresident alien would be subject to "confiscation" by that foreign government. The Supreme Court observed that in applying this type of inheritance statute elsewhere, the probate courts of various states have

> launched inquiries into the type of governments that obtain in particular foreign nations – whether aliens under their law have enforceable

> rights, whether the so-called "rights" are merely dispensations turning upon the whim or caprice of government officials, whether the representation of consuls, ambassadors, and other representatives of foreign nations is credible or made in good faith, whether there is in the actual administration in the particular foreign system of law any element of confiscation. (389 U.S. at 434.)

Specifically in Oregon, the statute had led the probate courts

> into minute inquiries concerning the actual administration of foreign law, into the credibility of foreign diplomatic statements, and into speculation whether the fact that some received delivery of funds should "not preclude wonderment as to how many may have been denied 'the right to receive.' . . . " (389 U.S. at 435.)

The Oregon statute was held to be an invalid intrusion upon the foreign affairs power of the Federal Government because this "unavoidable judicial criticism of nations . . . affects international relations in a persistent and subtle way" (*Id.* at 440) and permits the "State, speaking through its probate courts . . . to establish its own foreign policy." (*Id.* at 441)

The *Zschernig* decision is distinguishable on several grounds. First, the Supreme Court expressly declined to overrule *Clark v. Allen, supra,* which upheld the facial validity of a California reciprocity law similar to the Oregon statute. That case "seemed to involve no more than a routine reading of foreign laws" and, as such, had a permissible "incidental or indirect effect in foreign countries." See *Zschernig,* 389 U.S. at 432-434. Unlike *Zschernig,* implementation of the Divestiture Ordinance

requires no analysis by the State Courts and, indeed, no continuing investigation, assessment or commentary by local government officials or employees into the laws or operations of the South African government. The only ongoing analysis prompted by the Ordinance is whether a corporation in fact does business in or with that country. The governmental involvement found repugnant in *Zschernig* is not present here.

Second, *Zschernig* involved the exercise of a State's regulatory power; the Ordinance involves the exercise of a local government's proprietary power. It is permissible to conclude, as *Zschernig* indicates, that a State's continued involvement in its regulation of inheritance rights of foreign nationals impinges upon the Federal Government's conduct of foreign affairs. But this does not compel the conclusion that a state or local government may not establish moral guidelines when investing its own funds solely for proprietary purposes.*

Third, the statute in *Zschernig* directly affected the rights of citizens of foreign countries. The Ordinance, in contrast, directly relates to American companies which

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*The Defendant also seeks to justify the Ordinance on economic grounds: that investment in companies doing business in South Africa is risky *per se* because of that country's unstable political situation. This proposition is untenable, since the Ordinance makes no distinction between companies whose financial stability will or will not be affected by what is often only a minimal presence in South Africa. Moreover, there is no credible evidence that the market price of a stock will be affected merely by that company's presence, no matter how small, in South Africa. The Ordinance cannot be boot-strapped on this faulty economic premise.

do business in or with South Africa.** The record in this case demonstrates that the Ordinance has a minimal, if indeed any, effect on South Africa itself. The Investor Responsibility Research Center (IRRC) is an organization which does research for institutional investors on social and public policy issues. In 1978 a separate research division of IRRC was created, focusing specifically on South Africa. This division, The South Africa Review Service, has been directed since 1983 by David P. Hauck. Mr. Hauck is an acknowledged expert on American corporate presence in South Africa. He testified that there are three factors causing companies to terminate their direct investments in South Africa: (1) the deteriorating political and economic situation in that country; (2) the loss of business in the United States as a result of procurement ordinances such as those enacted by 15 or 16 cities, which place restrictions on the granting of municipal contracts to companies doing business in South Africa; and (3) negative public relations, a subcategory of which is divestment. It was his opinion that the first two factors are "paramount" in the decisions of companies to withdraw their South Africa investments, and that there is a significant "gap" between those two factors and the influence of divestment. He asserted unequivocally that divestment alone would not cause companies to leave South Africa and that the divestment movement does not create political instability in that country. These conclusions are uncontradicted in the record, are persuasive and are accepted by this court.

**As previously noted in the Preliminary Statement, *supra*, the Ordinance is addressed in this case only insofar as it relates to prohibiting investment in *American* companies doing business in South Africa.

Even though some of the supporters of the divestment movement may have hoped to exert economic and political pressure on the government of South Africa in order to bring an end to apartheid, that aspiration has not been realized. Perhaps ironically, the more successful that aspiration would be, the closer the Ordinance would come to encroaching on an area reserved exclusively for the Federal government. The primary, realistic effects of the Ordinance are an expression of moral outrage at the repugnant policies of a foreign nation and a refusal to be identified in even the remotest way with a company which does business in or with that country. The outer reaches of the Ordinance can fairly be described, therefore, as having no more than "some incidental or indirect effect in foreign countries." (*Clark v. Allen, supra*) and some "foreign resonances" (*Container Corp. v. Franchise Tax Bd., supra*), which are permissible, without attaining the impermissibly intrusive level of having "a direct impact upon foreign affairs" (*Zschernig v. Miller, supra*). It seems unlikely that the Supreme Court of the United States would extend the *Zschernig* decision to the significantly distinguishable facts of the present case. The Divestiture Ordinance does not intrude upon the exclusive Federal power to conduct foreign affairs.

4. *The Foreign Commerce Clause*

The United States Constitution also confers upon Congress the power to regulate "Commerce with foreign Nations," Art. 1, §8, cl. 3. The Plaintiffs also see a conflict between this constitutional provision and the Ordinance. While the Defendant suggests that the issue here can be disposed of on the same basis as the Interstate Commerce

Clause, it is unlikely that the market participation doctrine would be so extended. See *Reeves, Inc. v. State, supra,* 447 U.S. at 438, n.9. It is now well settled that a "more extensive constitutional inquiry" is required when analyzing the Foreign Commerce Clause instead of the Interstate Commerce Clause. *Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434, 446 (1979). The first additional inquiry (not present here) is the risk of international multiple taxation, and the second is whether the law "prevents the Federal Government from 'speaking with one voice when regulating commercial relations with foreign governments.' " *Id.* at 451. The "one voice" standard is violated if it "*either* implicates foreign policy issues which must be left to the Federal Government *or* violates a clear federal directive," the latter consideration being "essentially a species of pre-emption analysis." *Container Corp. v. Franchise Tax Bd.,* 463 U.S. 159, 194 (1983). (Emphasis in original.) [The pre-emption issue is discussed separately, *infra.*] *Japan Line* invalidated a California tax imposed on a Japanese vessel engaged exclusively in foreign commerce, even though the tax was formulated solely on the basis of the vessel's business in California ports. This tax ran counter to a trade convention signed by the United States and Japan and therefore prevented the Federal Government from "speaking with one voice" in international trade. *Japan Line,* 441 U.S. at 453. That case specifically did "not reach" the question of taxability of *domestically* owned instrumentalities engaged in foreign commerce. *Id.* at 444, n.7. Four years later *Container Corp.* upheld a California franchise tax imposed on a Delaware corporation engaged in interstate and foreign commerce. One of the primary reasons for finding no

conflict with the Foreign Commerce Clause was because the tax was imposed "not on a foreign entity as was the case in *Japan Line,* but on a domestic corporation." 463 U.S. at 195. The Supreme Court saw little danger of "significant foreign retaliation" and recognized that the Court itself had "little competence in determining precisely when foreign nations will be offended by particular acts." 463 U.S. at 194.

The case at bar is more closely analagous [sic] to the facts in *Container Corp.* than in *Japan Line.* The Ordinance applies to domestically owned companies engaged in foreign commerce, rather than foreign companies doing business in the United States.* Moreover, no persuasive evidence has been presented to reasonably suggest that retaliation by South Africa is a realistic reaction to the Ordinance. Even more basic to the commerce aspect itself, and as previously noted, the divestment movement is a minor factor in influencing the withdrawal of American companies from South Africa. The Ordinance's influence on foreign commerce cannot in any way be characterized as more pervasive than the California tax upheld in the *Container Corp.* case.

The Ordinance does not conflict with the Foreign Commerce Clause of the United States Constitution.

5. *Federal Preemption*

The Plaintiffs contend that the Ordinance is preempted by The Comprehensive Anti-Apartheid Act of

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*See Preliminary Statement, *supra.*

1986 (the "CAAA" or the "Act"), Pub.L. No. 99-440, 100 Stat. 1086 *et seq.* (1986). This Federal statute, *inter alia,* prohibits new investment in South Africa by American companies but permits continuation of existing investment; bans certain imports from, and exports to, South Africa; and requires compliance with the Sullivan principles by any U.S. company employing more than 25 persons in South Africa. The Act adopts the "carrot and stick" approach by permitting the President to suspend or modify the sanctions if anti-apartheid progress is made by the South African government or to impose more stringent sanctions if substantial progress has not been made. The Senate version of the Act was subsequently passed intact by the House. The House appended a Resolution stating that

> " . . . it is not the intent of the House of Representatives that the bill limit, preempt or affect in any fashion, the authority of any State or local government . . . to restrict or otherwise regulate any financial or commercial activity respecting South Africa."

The House Resolution was not considered by the Senate.

The Plaintiffs view the CAAA as completely occupying the field as to all matters touching in any way on relations with South Africa, or at the very least, as to all matters regarding the subject of investment in South Africa by United States nationals; and conclude that because the Ordinance attempts to regulate that very subject, it is preempted by Federal law.

In the absence of express language, preemption is not to be lightly presumed, *California Federal Savings & Loan*

Association v. Guerra, 107 S.Ct. 683, 689 (1987). Significantly, no preemptive language is present in the Act. Moreover, the legislative history is far from conclusive in advancing the Plaintiffs' position. During the debates preceding enactment, members of Congress expressed conflicting views on the premption issue. It is interesting to note that the Plaintiffs seek support in the statement by Rep. Wheat when he introduced the already-passed Senate bill together with the House Resolution. Mr. Wheat said this:

> " . . . [I]t is not the intent of this body to pass any legislation which grants any new constitutional authority. It is merely our intent to make it clear that this legislation does not impact upon the authority that States and local governments already have. If the State of California has the right to pass legislation affecting their own funds in regard to the situation in South Africa, then they continue to have that authority." 132 Cong.Rec.H6767 (statement of Rep. Wheat).

If anything, this statement is a virtually explicit endorsement that the CAAA is to have *no* preemptive effect on State and local divestment legislation. Furthermore, the presence of the Resolution on the House side is more persuasive of an overall legislative intent *not* to preempt the field than its absence on the Senate side would be evidence of a preemptive intent, especially where preemption is not to be presumed.

That the Ordinance may touch on an area of Federal concern is by no means dispositive. In the *Container Corp.* case, *supra,* the Supreme Court noted that the "Federal Government, to the degree it has spoken, seems to prefer

the taxing method adopted by the international community to the taxing method adopted by California." 463 U.S. at 187. Nevertheless, the California tax was held not to be "pre-empted by federal law or fatally inconsistent with federal policy." 463 U.S. at 197. Similarly, Congress "seems to prefer" retention of an American business presence in South Africa, while the Ordinance proponents do not. This federal "preference," as in *Container Corp.*, is not tantamount to preemption.

Finally, if Congress intended, in one fell swoop, to invalidate over 100 State and local divestment laws [a fact expressly made known to Congress, 132 Cong.Rec. at H6766 (statement of Rep. Dixon)], it is reasonable to conclude that there would have been express language to that effect. In this context, the absence of preemptive language makes it extremely laborious to presume or infer a preemptive intent.

For these reasons, it must be concluded that the Federal anti-apartheid legislation does not preempt the ordinance.

6. *Impairment of Contract*

The evidence presented on this issue involves massive financial investment data, including charts, graphs and intricate mathematical computations. Since the legal analysis does not require such minutely precise calculations, rounded-figure references will be used. It should also be noted that the evidence pertains to a subject involving hundreds of millions and even billions of dollars. Consequently, witnesses oftentimes would talk in terms of, for example, "three or four million dollars" (or

greater variances) without attempting to distinguish between the two. While such differentials are significant in absolute terms, they are less meaningful in the context of their percentage relationship to the much larger sphere which is being discussed. It becomes necessary, therefore, to consider the numbers in their proper perspective.

The Retirement Systems hold funds for investment ("the Pension Funds") totalling $1.2 billion. There are three distinct categories of investments: equities (primarily common stocks); fixed income securities (primarily long-term bonds); and cash equivalents, also referred to as a short-term investment fund ("STIF") (primarily debtor instruments issued by the U.S. Government or private companies payable on demand or in periods of 90 days or less). The Trustees have established targets of allocating investments as follows:

Equities - 40%
Fixed Income (FI) - 50%
STIF - 10%

In actuality, the equity investments have ranged between 44% and 48% of the total Pension Funds. One third of the Pension Funds are now invested in American companies doing business in South Africa ("SA companies"), worth some $400 million, which must be divested pursuant to the Ordinance.* The SA companies comprise about one-half of the investment in the equities portfolio.

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*On any given day it is difficult, if not impossible, to identify precisely all the SA companies. This is because some companies decide to leave South Africa altogether, while some decide to cease their direct investments but retain indirect

(Continued on following page)

The S&P 500 is a compilation of approximately 500 publicly traded companies, representing a cross-section of the various sectors of the economy. It is an index designed to reflect the movement of the stock market as a whole (over 5,000 companies are publicly traded) and is used by many investment analysts to measure equity market performance. Approximately 120 of the S&P 500 companies do business in South Africa and would be prohibited investments under the Ordinance. These 120 companies represents 40% of the total capitalization of the S&P 500. (A company's capitalization is the product of the number of shares of stock of that company multiplied by the trading price per share. IBM, an S&P 500 company, has a capitalization equal to that of the 200 smallest S&P companies.) As can readily be seen, a disproportionate number of the largest S&P 500 companies are SA companies. This is because larger companies (whether included in the S&P or not) are more likely than smaller companies to do business elsewhere in the world, including South Africa.

(Continued from previous page)

investments through franchising or licensing agreements. Their identities, or the nature of their involvement in South Africa, sometimes cannot be immediately ascertained. Moreover, the various research lists (such as the South Africa Unified List and the IRRC List with Appendix F) are issued periodically, thus creating a lag time between actual withdrawal and awareness by investment managers of the withdrawal. Additionally, the Unified List and the IRRC List are not identical, for various reasons. Despite the inability to achieve 100% accuracy in identifying all SA companies, virtually all of the SA companies were known to the witnesses whose testimony related to this identification. The deviations in this regard are so minor as not to affect the analysis of the issues in this case.

Because of this disproportionate international activity, any equity investment portfolio restricted to South Africa-free ("SAF") companies can be expected to have more investments in companies of relatively smaller capitalizations than for those of an unrestricted portfolio. In the terminology of the investment world, a company having a capitalization of under $500 million is a "small" company; $500 million to $2 billion is "medium-sized"; and over $2 billion is "large." The SEI index of 4200 investment portfolios reveals that the average capitalization of a company in an unrestricted portfolio is $8 billion, but "only" $3.7 billion in an SAF portfolio.

The Ordinance disqualifies investments in many, but by no means all, of the largest American corporations. But investments in more companies of smaller capitalizations is inevitable. The prices of stocks in smaller companies are more volatile, that is, subject to sharper price fluctuations. As a general rule, volatile stocks do better than more stable stocks in a good market but do poorer in a bad market. This is not necessarily a disadvantage, since the market has more up cycles than down cycles. Historically, larger companies have not performed as well as smaller ones in the market, primarily because of their advanced maturity level and accuracy of price. Investment in smaller companies with the attendant greater volatility does not necessarily result in a significantly impaired risk. In the long run, there is a reasonable likelihood that stocks of smaller, more volatile companies, if prudently selected, will do at least as well as, if not better than, stocks in the larger companies which must be divested.

Most of the money managers of the Plaintiffs' Pension Funds engage in "active" management, that is, they actively trade equity stocks so as to outperform the market index, such as the S&P 500. The Ordinance will reduce their ability to select stock investments, particularly in many of the largest companies. However, all of these managers balance their investments through the various sectors of the market. Investors usually categorize the market into six or eight sectors. Although some sectors are more affected by the Ordinance than others, and a few subsectors are virtually eliminated by the Ordinance, adequate SAF replacement stocks can be found for each sector, even though the SAF companies will be replacing larger companies.

By forcing a money manager to find replacement stocks for the SA companies disqualified by the Ordinance, it is of course true, as several witnesses noted, that the manager is being forced to use his second choice of stock instead of his first. But it is not axiomatic that the manager's second choice is inferior to the first. Virtually all active managers limit their investments to only a handful of stocks, even though there are many other stocks which qualify for investment within the standards established by that manager. The fact that these companies are not then being utilized by a manager does not necessarily mean they are less worthy. Managers invest in companies they are well versed on, and proper active management control does not lend itself to a utilization of too many stocks at one time. The Ordinance will affect the management style of the Plaintiffs' active money managers by forcing them to become familiar with and find adequate replacement stocks. It is possible that some

may not be able to adjust to the revised investment universe prompted by the Ordinance, but the two money managers of the Plaintiffs who testified at trial do manage SAF portfolios satisfactorily, in addition to their unrestricted ones. (They are among the eleven largest money managers in the country.) Even though there was considerable evidence about the effect of divestment on the internal procedures of the money managers, not one witness was able to express the opinion that the percentage return on the Plaintiffs' equity investments will be reduced because of the Divestment Ordinance.

All parties cited the performance of various SAF equity funds. Some have fared better than the unrestricted equity funds of the same money manager; some fared worse. Many did better than the S&P 500. All the experts agreed, however, that the track records of these SAF funds is too short (less than three years) to be statistically significant.

For all of these reasons, it cannot be concluded that the Ordinance will impair the performance of the equity investments of the Pension Funds.

The parties have agreed that the Ordinance will not impair the performance of the fixed income (FI) investments of the Pension Funds, since the long term securities now held in SA companies can readily be replaced with equal SAF investments.

The performance of the short term investment fund ("STIF") will, however, be affected by the Ordinance. The STIF is used to meet the immediate or short term liquidity needs of the Pension Funds and is pooled with numerous other STIF funds from other owners into a

common STIF operated by a local bank. The Ordinance will not permit continued participation in the pooled STIF, since that fund invests in SA companies. A separate STIF will have to be administered for the Plaintiffs. Because only a few corporations issue enough short term paper (less than one week) to satisfy the needs of the Plaintiffs' STIF, the primary ones being SA companies, it will be necessary for the Plaintiffs' STIF to sharply increase its ratio of investment in United States Treasury Bills. These T-Bills pay a lower interest rate than the SA companies. The bank had managed the pooled STIF without fee, but virtually all SAF STIF's require a management fee because of the investment limitations. The loss of interest income (due to the increase in the use of the lower-paying T-Bills) plus the newly-imposed management fee will result in a decreased annual return from the STIF of .75%, or three-quarters of 1%. The STIF constitutes approximately 10% of the total Pension Funds; the STIF's current value is $120 million. The loss of income will be $900,000 per year, which is less than one-tenth of 1% of the total value of all the Pension Funds.

Certain other costs to the Pension Funds will be triggered by the Ordinance. It will be necessary to sell off 47% of the equity portfolio (almost $240 million) over a two-year period and purchase replacements (*i.e.*, the round trip). Since the replacements will on the average be of smaller priced stocks, the commission cost per share will be greater for the purchases than for the divestment. There is disagreement in the literature and among market analysts as to whether stock transactions of this magnitude adversely affect the price of the stock, resulting in "implicit" or "execution" costs. The literature which has

analyzed the most transactions concludes that there are *no* implicit costs in these institutional trades. Considering both the documentary evidence and the trial testimony on this issue, Plaintiffs' proof is not more persuasive than the Defendant's. The Plaintiffs' computation of the direct costs also fails to allow for the fact that some sales of the stocks in the SA companies would occur in the normal course over a two-year period even if the Ordinance had not been passed (*i.e.*, turnover-backout). Accepting a 34 basis point (.034%) round trip charge for commissions but allowing for some turnover-backout savings, the one-time initial divestment cost for the equity portfolio will be $500,000.

Since the equity fund will continue to incur the incremental costs of trading in the smaller SAF stocks, additional commissions will be paid each year, which will amount to six basis points (.18 x .68 x .47 = .057) per year, or $300,000.

As for the FI fund, 10% would have to be divested, but there are no transactions costs to sell the bonds. The effect of turnover-backout, if any, is more elusive than with equities. The one-time cost to replace the divested securities for the FI fund will be $250,000, or .44% of the total bonds to be divested. The parties agree to the absence of any ongoing incremental transaction costs for this particular fund.

The Pension Funds pay two types of benefits to retirees: (1) Defined benefits- payment of a specific, constant amount based on the retiree's years of service and salary and irrespective of the earnings of the Pension Fund; (2) Variable benefits- additional distribution among

retirees of all annual earnings of the Pension Fund over 7.5% and below 10%, and one-half of the annual earnings in excess to 10% (the City receiving the other half of this surplus to offset the City's contributions and other administrative expenses). As a result of the variable benefit plan, which was commenced in 1984, and because of the excellent return on investment, the retirees receive annual bonuses of 36%-62% (depending on the number of years retired), which is subject to increase each and every year that the Pension Fund has excess earnings. The bonuses already accrued but payable in the future are funded by guaranteed investment contracts (GIC's) purchased from insurance companies.

Pension rights are contractual in nature. Under the Contract Clause of the United States Constitution, Art. 1, §10, cl.1, and under Maryland quasi-contractual law, a public employee's pension rights may not be impaired unless the lost benefits are "reasonable and necessary to serve an important public purpose," *United States Trust Company v. New Jersey,* 431 U.S. 1, 25 (1977), or are "justified by countervailing equities for the public's welfare," *City of Frederick v. Quinn,* 35 Md. App. 626, 631 (1977). For both propositions, see *Md. State Teachers Ass'n v. Hughes,* 594 F.Supp. 1353, 1361, 1362-1363 (D.Md. 1984) (aff'd in an unpublished opinion).

The Plaintiffs claim that the Ordinance violates the Federal Contract Clause as well as related Maryland law. At the outset it should be observed that the Ordinance does not change the amount of the defined benefits to be payable to present or future retirees. And nothing in the evidence suggests that the Ordinance will in any way jeopardize those payments one iota. As to the bonus

payments, they are dependent upon the future earnings of the Pension Funds. When these payments were granted by law in 1984, the enabling ordinance also provided that

> Section 10 and Section 42 to the contrary notwithstanding, any benefit increase provided under this section shall not become an obligation of the City of Baltimore. In the even of any conflict between Section 10 and/or Section 42 and this section, the terms of this section shall prevail.

Baltimore City Code, §§17 (e) (ii) and 36A (e) (ii). §§10 and 42 render pension payments obligations of Baltimore City. Since the variable benefits do not constitute such obligations, the usual contractual responsibilities attendant to pension benefits do not come into play.

Even if it were assumed that contractual rights for the variable benefits do exist, the extent of the impairment is without legal significance. As the Supreme Court said in *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245 (1978):

> The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alternation of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation.

The initial one-time divestment cost will be $750,000 ($500,000 for the equity portfolio over a two-year period and $250,000 for the FI fund), which is .062%, or one-sixteenth of 1%, of the total value of the Pension Funds. The ongoing annual incremental costs, based on current

values, are $1.2 million ($900,000 for the STIF and $300,000 for additional commissions for the equity portfolio), which is .10%, or one-tenth of 1%, of the Pension Funds. If the Pension Funds earn in excess of 10% per year (as has regularly been the case since 1984), the loss to the retirees is halved, since the City takes one-half of the excess earnings. Realistically, therefore, the initial cost to the pension system as a result of the Ordinance is one thirty-second of 1%, and the ongoing annual cost is one-twentieth of 1%. These adverse consequences, clearly, are of such a minimal nature as to not even approach Federal constitutional or State legal dimensions of "impairments." Even if the impairment were more significant, it would be insubstantial when compared to the salutary moral principle which generated the Ordinance.

The impairment claims are without merit.

CONCLUSION

For all of the foregoing reasons, it must be concluded that the Investment Ordinance of the Mayor and City Council of Baltimore is constitutional and legal.

July 17, 1987

Martin B. Greenfeld, Judge

(2)

No. 89-889

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

YALE LUBMAN, THOMAS J. MURPHY,
JOHN S. SEISS AND JOSEPH STEWART,
Petitioner

—v.—

MAYOR AND CITY COUNCIL OF
BALTIMORE CITY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI

**RESPONDENT'S BRIEF IN OPPOSITION
AND IN THE ALTERNATIVE
REQUEST FOR SUMMARY AFFIRMANCE**

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QUESTIONS PRESENTED

1. Are the Baltimore City Ordinances (the "Ordinances") valid under the Contracts Clause and Takings Clause of the Federal Constitution, and do they accord to the beneficiaries of the pension funds the due process of law?

2. Are the Ordinances a valid exercise of state powers, consistent with the Interstate Commerce Clause of the Federal Constitution?

3. Are the Ordinances a valid exercise of state and local powers, not preempted by federal statute or regulation?

4. Are the Ordinances consistent with the federal authority over foreign affairs, and with the Foreign Commerce Clause of the Federal Constitution?

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Respondent Mayor and City Council of Baltimore urges that the Petition for Writ of Certiorari filed herein which seeks review of the Maryland Court of Appeals' decision in *Board of Trustees of the Employees' Retirement System of the City of Baltimore, et al. v. Mayor and City Council of Baltimore City,* 317 Md. 72, 562 A.2d 720 (1989) be denied, or in the alternative, that this Court summarily affirm the decision of the Maryland Court of Appeals pursuant to Rule 16.1 of the Supreme Court Rules.

STATEMENT OF THE CASE

The Maryland Court of Appeals unanimously affirmed a ruling of the Circuit Court for Baltimore City[1] sustaining the validity of Baltimore City Ordinances Nos. 765 and 792 of 1986 ("the Ordinances"). The Ordinances require that the Boards of Trustees ("Trustees") of the Baltimore City Employee Pension Funds[2] divest their holdings in companies doing business in South Africa and Namibia ("SA" companies) within two years, plus such extensions as the Ordinances permit.[3] The Court of Appeals concluded that the Ordinances represent a moderate attempt by the City of Baltimore "simply to ensure that the City's pension funds would not be invested in a manner that was morally offensive to many Baltimore residents and many beneficiaries of the pension funds." P. App. at D-61. The Ordinances "permit the City and its citizens to distance themselves from the moral taint of co-venturing in firms that in the view of many, help to maintain South Africa's system of racial discrimination." P. App. at D-82.

The Court of Appeals held, as a matter of Maryland law, that the Trustees are agencies of Baltimore City, P. App. at D-16, to administer retirement systems "established" and "maintained" by the City pursuant to its general charter powers. Baltimore City Charter, art. II, 24-26 (1964); Respondent's Appendix ("R. App.") at A-1 to A-7. The Funds' annual reports acknowledge that each Fund is a "component unit" of the City because of, *inter alia,* financial interdependency with the City, the City's right to designate management, the City's ability to significantly influence

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[1]The Circuit Court opinion is printed in Petition Appendix ("P. App.") at E-1 to E-31.

[2]Employees' Retirement System of the City of Baltimore ("ERS"); Fire and Police Employees Retirement System of the City of Baltimore ("F&P"); and the Elected Officials Employees Retirement System of the City of Baltimore ("EOS") --hereinafter collectively "the Funds." The Funds have a stipulated value of $1.2 billion, and are pooled for investment purposes.

[3]The Trustees were empowered to suspend the operation of the Ordinances in order to make doubly sure that the performance of the Funds would not suffer. The standards and procedures prescribed for suspension are summarized at P. App. D-4 and D-5. The two year period has been continuously suspended and has not yet begun to run with respect to the ERS and the F&P. As to the EOS, which amounts to only approximately $2.7 million, the operation of the Ordinances was suspended until February 1, 1989.

operations, and the Funds' accountability to the City for fiscal matters. R. App. at C-1 to C-6.

The powers of the Trustees with regard to investment have been closely regulated by the City from the inception of the Funds. Baltimore City Code, art. 22, §§ 7, 23 & 35 (1989 Supp.); R. App. at B-1 to B-14, B-16 to B-30. The Ordinances amended these sections of the City Code by adding to the limitations on the Trustees' investment powers a provision that at the expiration of two years after the Ordinances' effective date, plus applicable extensions, the Trustees shall be divested of holdings in SA companies. The Ordinances did not change any provisions relating to benefits.

In December, 1986, the Trustees filed this action in the Circuit Court for Baltimore City seeking to have the Ordinances declared invalid. P. App. at D-6. Petitioners unsuccessfully attempted to intervene.[4] After a lengthy trial, during which "the parties presented a large amount of highly technical evidence concerning the Ordinances' financial impact", P. App. at D-7, the trial court upheld the validity of the Ordinances. The Maryland Court of Appeals affirmed this holding in a painstaking and exhausting opinion. P. App. at D-1 to D-88.[5] The Court of Appeals reversed the denial of intervention, but Petitioners waived any right to a remand for additional evidence, declaring themselves content with "the status of parties" before the Court of Appeals "and for all future proceedings in the case. . . ." P. App. at D-18. Both the trial court and the Maryland Court of Appeals closely examined and then rejected the crux of Petitioners' argument—the contention that the Ordinances significantly impact on the assets of the Funds and on interstate and foreign commerce. It was conceded during the course of the trial that the Ordinances would not impair the performance of the fixed income investments of the Funds. P. App. at E-26. Similarly, no expert for either side could opine that the Ordinances would adversely affect

[4]Counsel for Petitioners did not participate in the evidentiary phase of the trial; however, Petitioners were represented by the Trustees acting in their fiduciary capacity, and Petitioners' counsel were permitted to participate in legal argument.

[5]After reviewing the Court of Appeals decision, the Trustees voted not to seek certiorari.

the Funds' equity investments, and the evidence did not permit the conclusion that such an adverse effect would occur. *Id.*; P. App. at D-8.[6]

After exacting examination, the cost of divesting to the Funds was found to be miniscule. The trial court fixed the total of the one-time initial divestment cost for the Funds' equity and fixed-income portfolios at $750,000. P. App. at E-3O. It fixed the annual incremental cost of trading SAF stock at $300,000, *id.* at E-28, and the reduction of the annual return on the Funds' short term investment at $900,000. It found that "[r]ealistically . . . the initial cost to the pension system as a result of the Ordinance[s] is one thirty-second of 1%, and the ongoing annual cost is one-twentieth of 1%." *Id.* at E-31. The Court of Appeals agreed. *Id.* at D-11. Neither the Trustees nor the Petitioners have challenged these figures. Maryland's Court of Appeals affirmed the trial court's finding of fact that "nothing in the evidence suggests that the Ordinance will jeopardize . . . one iota" the defined benefits payable to present or future retirees. *Id.* at E-29-30.[7]

[6]Petitioners' attempt to use the the market capitalization of the SA companies on the Standard & Poor 500 list as a measure of the impact of divestiture, *see* Petition at 4, is specious. For example, eliminating the half of the United States east of the Mississippi River from the area of the United States to be searched for the highest mountain in the United States would not diminish the statistical probability of finding the highest mountain in a search confined to the remaining area. Similarly, as found below, the universe of equities left after divesting holdings in SA companies permits the selection of investment portfolios which will perform as well if not better than undivested portfolios, P. App. at D-32-33, and will have appproximately the same level of exposure to market risk. As the Court of Appeals stated, under the divestiture program, "economically competitive, substitute investments remain available." P. App. at D-33. At most, divestment simply involves more frequent stock transactions, P. App. at D-11—clearly not a barrier to commerce.

A significant portion of the SA companies' market capitalization cited by Petitioners is represented by one company, IBM. P. App. at E-23. Further, although South-Africa-Free ("SAF") companies tend to have a smaller capitalization than do SA companies, the average capitalization of a company in a SAF portfolio is still $3.7 billion, *id.* at E-24, and in the long run such stock performs as well or better than that of companies with larger capitalization. P. App. at D-9. "[A]dequate SAF replacement stocks can be found even though the SAF companies will be replacing larger companies." P. App. at E-25.

[7]Consequently, Petitioners' assertion that the rate of return on the pension trust funds will decline, Petition at 18 n.4, is absolutely incorrect. *See* P. App. at D-8, D-32-33.

The scope of the Ordinances is tightly circumscribed. The Ordinances simply direct how and in what securities public funds should be invested by a public instrumentality. They apply only to the Trustees. They do not curtail any rights or impose any obligations on individuals or on the companies themselves. They do not require private parties to do anything. They do not affect direct transactions in the regular course of any SA company's business. They are not a boycott. They do not threaten any SA company with the loss of revenue in the operation of its business, or impose any penalty or restriction on any company.[8] They do not favor residents of the City of Baltimore or the State of Maryland or any other state. They do not reflect an intention on the part of Baltimore City to secure economic advantages for local businesses at the expense of businesses situated elsewhere. They cover only a "discrete, identifiable class of economic activity," P. App. at D-74,

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[8]Petitioners' contention that if the decision of the Maryland Court of Appeals is allowed to stand, "any state or city in this country could adopt legislation that *penalized American companies* for doing business in any foreign nation with whose internal policies that particular city or state administration disagreed," Petition at 12 (emphasis added), strays beyond the record in this case and exceeds the bounds of fair argument. So does Petitioners' contention that the Ordinances are "prescriptive legislation that purports to have binding impact on the activities of Americans abroad or on the conduct of foreign governments." Petition at 7.

Similarly, Petitioners' reliance, Petition at 14 n.3, on *Wickard v. Filburn*, 317 U.S. 171 (1942), is misplaced. First, the Ordinances cannot be fairly lumped with exclusionary procurement laws which prevent sales or contracts with the companies targeted by such laws, or lumped with other divestment ordinances or statutes much differently drafted, or with ordinances pertaining to Northern Ireland, nuclear free zones, etc. Petition at 8-10. Second, *Wickard* held that the triviality of any individual farmer's production did not preclude Congress, in the exercise of its plenary power over interstate commerce, from including that farmer's production in an overall regulation covering the total crop of all farms, whereas the instant case involves the validity, under the "dormant" commerce and foreign relations powers, of the Ordinances of a single city. In the instant case, Petitioners' "aggregate effect" argument proves too much. It would overturn all the well-settled cases on this subject ever decided by this Court. If the test of validity of local legislation with "foreign resonances" were the speculative aggregate effect of all the laws with foreign resonances that could conceivably be enacted throughout the country, then not one of the precedents of this Court upholding such laws, when the effect of the law before the Court was only indirect and incidental, could have been decided as it was. *Wickard* has no relevance here.

namely, the City's sale and purchase of a limited class of securities.

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari should be denied, because this case does not raise or implicate any substantial issue of federal constitutional or statutory law. The Ordinances are a valid exercise of a local government's well-settled power over the investment of its funds. The Ordinances no more offend federal statutory or constitutional law than would the decision of any investor to select one security rather than another.

The "Questions Presented" as framed in the Petition mischaracterize the nature and effect of the Ordinances, and there are no "special and important reasons" (which Rule 10 of the Rules of this Court requires) why the questions actually raised by the record in this case should be reviewed by this Court.

If, however, notwithstanding the legal insubstantiality of the issues presented by this record, the political significance of the Ordinances disposes the Court to pronounce upon this case, Respondent urges summary affirmance of the decision of the Maryland Court of Appeals pursuant to Supreme Court Rule 16.1.[9] That decision below upholding the Baltimore City Ordinances is compelled by the facts established at trial and by well-settled federal law.

The Ordinances are not an unconstitutional impairment of contract because: (a) there is in fact no contractual right or obligation impaired by the Ordinances; (b) even if a contract right could be said to be impaired, the impairment is not substantial; and (c) any conceivable impairment would be not only minimal but also a justified exercise of local powers.

The Ordinances do not deprive the Petitioners of due process of law or take property without just compensation, because Petitioners have no property interest in the Funds themselves; they have only a contract interest (which the Ordinances do not change) in certain benefits provided pursuant to Article 22 of the Baltimore City Code.

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[9] "[T]he Court may summarily affirm when it believes that the decision below is not only correct but that the issue is sufficiently important to need the added weight of Supreme Court approval." Stern, Gressman and Shapiro, *Supreme Court Practice* 287 (6th ed. 1985).

The Ordinances do not violate the Interstate Commerce Clause because they are a valid exercise of state or local power exempted from the strictures of the Interstate Commerce Clause by the "market participant" doctrine; and even if the "market participant" doctrine did not apply, the Ordinances would be valid under the Commerce Clause because their effect on commerce is incidental and non-discriminatory, and they effectuate legitimate local public interests. The Ordinances have not been preempted under the Supremacy Clause by an express federal statute or regulation, by Congressional occupation of the field or by conflict with federal law or regulation; in fact, Congress has indicated that state and local divestment ordinances are expressly permitted and fully consistent with federal policy toward South Africa. Finally, the Ordinances do not infringe upon either the federal foreign relations power or the Foreign Commerce Clause; the Ordinances are a proper exercise of state sovereignty, they concern investment by a local governmental instrumentality—a matter traditionally within state power—and they have only slight, indirect and incidental effect on foreign affairs or foreign commerce.

ARGUMENT

I. The Baltimore City Ordinances Do Not Violate the Contracts Clause of the Federal Constitution and Do Not Take Petitioners' Property Without Just Compensation or Deny Petitioners Due Process of Law.

A. The Ordinances Do Not Violate the Contracts Clause.

The Ordinances do not change any contractual obligation, their effect on benefits from the Funds is insubstantial, and they are "reasonable and necessary to serve an important public purpose." *Allied Structural Steel Company v. Spannaus,* 438 U.S. 234 (1978); *United States Trust Company v. New Jersey,* 431 U.S. 1 (1977).

1. The Ordinances Do Not Change Any Contractual Rights or Obligations.

Petitioners do not identify any specific contractual right or obligation impaired by the Ordinances. Petition at 20-21. In fact, the Ordinances do not alter or impair any contract rights. The Court of Appeals properly concluded, and Petitioners have pointed to

nothing that would detract from that conclusion, that the Ordinances do not "alter the provisions in the law concerning the amount of benefits that a retiree is entitled to receive, [and thus] do not directly change the City's pension contracts with the system's beneficiaries." P. App. at D-28. No direct financial obligation of the City has been changed. No existing appropriation has been rescinded. No trust or pledged funds have been diverted to other uses. *Cf. United States Trust Company v. New Jersey,* 431 U.S. at 20-21.

Petitioner's only ground for complaint under the Contracts Clause is that the initial and ongoing costs of divestiture may slightly diminish future variable benefits. However, the Baltimore City Code has at all material times made clear that these benefits "shall not become an obligation of the City of Baltimore." *See* Baltimore City Code, art. 22, § 17(e) (ii) (1983 Repl. Vol.); R. App. at B-15. As the Court of Appeals pointed out, this provision means that while Petitioners have contract rights to whatever variable benefits are earned, they have no such rights to any particular level of earnings or to any variable benefits beyond the prescribed percentage of whatever the earnings are. P. App. at D-28 n. 26.[10]

2. Even if the Ordinances Impaired Petitioners' Contract Rights, the Contracts Clause Would Not Be Violated, Because the Impairment Would Be Insubstantial.

Impairment of a contractual obligation is not constitutionally invalid under the Contracts Clause unless it is "substantial", and the burden of establishing substantiality is on Petitioners. *Energy Reserves Group, Inc. v. Kansas Power and Light Co.,* 459 U.S. 400, 411 (1983). In the instant case, there is no gainsaying the trial judge's findings, affirmed by the Maryland Court of Appeals, that the cost of the Ordinances to the retirement systems, and thus to the systems' beneficiaries in terms of future variable benefits, "is so minimal that it does not approach the constitutional

[10]Variable benefits already accrued are funded by Guaranteed Investment Contracts (in the nature of annuities) and are in no way affected by the Ordinances. The Petitioners' assertion that the Court of Appeals found that "there was no impairment of contract because the change in variable benefits would be insubstantial", Petition at 6, is incorrect. Instead, the Court below actually held that variable benefits were by definition "speculative and uncertain", and therefore the beneficiaries could have no "distinct expectation" as to the amount of variable benefits they would receive. P. App. at D-44-45.

standard for impairment." P. App. at E-29-30. Also weighing heavily against any contention that the Ordinances work a substantial impairment is the fact that investment of Fund assets has always been closely regulated by ordinance, and the permissibility of particular investments has been readily changed by legislation as deemed appropriate. *Energy Reserves Group, Inc. v. Kansas Power and Light Co.,* 459 U.S. at 411; *United States Trust Co.,* 431 U.S. at 21 n.17.[11] The frequent changes traditionally made by the City in the Trustees' investment authority are notice that further changes are to be anticipated; and that anticipation blunts the impact, and thereby reduces the substantiality of the impact of any particular change. *Cf. City of El Paso v. Simmons,* 379 U.S. 497, 514 (1965) (as in the case of the variable benefits here, any impairment was not substantial because the asserted covenant "was not the central undertaking" of the city "nor the primary consideration" for the alleged contractual undertaking).

Because, as the Maryland Court of Appeals correctly stated, variable benefits are "as their name suggests, speculative and uncertain", P. App. at D-45, any impairment of these benefits is not substantial; to the extent the Ordinances affect such benefits, the Ordinances do not interfere with "distinct investment-backed expectations." *Connolly v. Pension Benefit Guaranty Corp.,* 475 U.S. 211, 224-25 (1986).

3. In Any Event, the Ordinances Are a Justified Exercise of Local Legislative Power Because They Are Reasonable and Necessary to Serve an Important Public Purpose.

This Court has recognized that even a substantial impairment of contract will not violate the contract clause if it is justified as reasonable and necessary to advance an important and legitimate

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[11] As the Maryland Court of Appeals pointed out, the Petitioners' contractual right to receive benefits does not give them a right to direct or control the investment of funds in the pension systems. P. App. at D-43. *See also Withers v. Teachers' Ret. System,* 447 F. Supp. 1248, 1260 (S.D.N.Y. 1978), *aff'd,* 595 F.2d 1210 (2d Cir. 1979) (beneficiaries of a public retirement fund "have no entitlement to, or right to direct the retention of, the particular assets that are held for investment purposes in the pension fund"); *Crown v. Patrolmen's Variable Supp. Fund Trustees,* 659 F. Supp. 318, 320 (S.D.N.Y.), *aff'd,* 819 F.2d 47 (2d Cir. 1987); *Tron v. Condello,* 427 F. Supp. 1175, 1189–90 (S.D.N.Y. 1976) (beneficiary "has a vested right in receiving his pension benefits, but not in regulating the investment policy set by the legislature and the retirement board").

public purpose.[12] *United States Trust Company v. New Jersey,* 431 U.S. at 21-26; *Allied Structural Steel Company v. Spannaus,* 438 U.S. at 244; *Energy Reserves Group,* 459 U.S. at 411-12. An impairment of contract is reasonable if it responds to developments that were unforeseen and unintended when the contract provision in question was made, *United States Trust Co.,* 431 U.S. at 31 n.30, or if it addresses a broad social problem in an effort to protect the public morals or otherwise promote the public welfare. *Allied Steel,* 438 U.S. at 241-42. It is "necessary" when there is no less drastic or restrictive measure appropriate to resolve the problem. *Energy Reserves Group,* 459 U.S. at 412.

The Ordinances here meet these criteria. Divestment of proprietary interests in SA companies is both reasonable and necessary for Baltimore City. The majority of Baltimore City's citizens are African-American. The use of city funds to invest in companies helping to support the economic base of discrimination and oppression in South Africa is of particular concern to the growing number of African-American members and beneficiaries of the pension funds and to all the citizens of Baltimore sensitive to the legacy of slavery from which America is still struggling to free itself. The effectuation of the highest and best moral standards of Baltimore City is precisely the kind of important public purpose that the cases contemplate as a basis for permitting even substantial impairments of contractual obligations under the Contracts Clause. *See East New York Savings Bank v. Hahn,* 326 U.S. 230, 233-34 (1945).[13]

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[12]The Maryland Court of Appeals made no finding as to whether any impairment would be justified as reasonable and necessary, because it concluded that there was no direct impairment of any contract right or obligation, and that any potential indirect impairment of variable future benefits was so insubstantial as to fail to implicate the Contracts Clause at all.

[13]The Trustees of the pension funds have properly taken social considerations into account in the past, even where this has cost the pension fund money. They made long-term mortgage loans of approximately 35 million dollars in 1983–84 at 1½ to 2 percent below the going interest rate to provide assistance to would-be home owners in a tight market. The "cost" to the fund has been approximately $525,000 per year.

The Ordinances are not the first instances in which the Trustees have been regulated by ordinances on the basis of social policies having foreign resonances, which work in tandem with federal policy. The pension funds' portfolio of investments includes an investment valued at $2,269,507.50 in the International Bank for Reconstruction and Redevelopment. The City Council's inclusion of this type of security and of

B. The Ordinances Do Not Take Petitioners' Property Without Just Compensation or Deny Petitioners Due Process of Law.

1. The Ordinances Do Not Take Petitioners' Property Without Just Compensation.

The Ordinances do not affect any property of Petitioners. Petitioners have no property interest in the Funds themselves but only contract interests in the benefits provided by Article 22 of the Baltimore City Code, and only subject to the limitations prescribed by that legislation and discussed above. *See Board of Regents v. Roth,* 408 U.S. 564 (1972); *Withers v. Teachers Ret. Sys. of New York,* 447 F. Supp. 1248, 1259-60 (S.D.N.Y. 1978), *aff'd,* 595 F.2d 1210 (2d Cir. 1979). Thus, there is no property interest affected by the Ordinances, and accordingly, the Maryland Court of Appeals was correct in holding that the Ordinances do not work a taking without just compensation.

2. The Ordinances Do Not Deprive Petitioners of Due Process of Law.

The Due Process Clause does not prohibit even retrospective civil legislation unless the consequences are "particularly 'harsh and oppressive'." *United States Trust Co.,* 431 U.S. at 17 n.13. Consequently, "less searching standards [are] imposed on economic legislation by the Due Process Clauses" than those "imposed on the States by the Contract Clause". *Pension Benefit Guaranty Corp. v. R.A. Gray Co.,* 467 U.S. 717, 733 (1984). Since the Ordinances do not impair Petitioners' contracts, Petitioners have certainly not been denied due process.

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securities in the InterAmerican Development Bank as permissible investments demonstrates that the instant Ordinances by no means pioneer in social investments of the funds. These investments were authorized by Ordinance 424 (1964) enacting art. 22 §§ 7(a) (2) and 34(a) (2) of the Baltimore City Code. By statute, the policy of the United States regarding those two institutions is to "advance the cause of human rights, including by seeking to channel assistance towards countries other than those whose governments engage in . . . [a] consistent pattern of gross violations of internationally recognized human rights, such as torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges, or other flagrant denial to life, liberty, and the security of person." 22 U.S.C. § 262 d(a) (1) (1989 Supp.).

II. The Ordinances Do Not Violate the Interstate Commerce Clause of the Federal Constitution.

A. The Ordinances Are a Valid Exercise of State Sovereign Power Exempted From the Strictures of the Interstate Commerce Clause by the "Market Participant" Doctrine.

". . . [W]hen a state or local government enters the market as a participant it is not subject to the restraints of the Commerce Clause." *White v. Mass. Council of Construction Employers, Inc.*, 460 U.S. 204, 208 (1983) (upholding executive order of mayor that city would fund only those construction projects on which 50% of the jobs were filled by *bona fide* city residents); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 808 (1976) (upholding law providing subsidies to local residents for scrapping abandoned motor vehicles); *Reeves, Inc. v. Stake*, 447 U.S. 429, 436–37 (1980) (upholding refusal to sell to out-of-state buyers cement produced at state-owned plant).[14] The Court of Appeals correctly described the City's role as a market participant:

> In mandating the divestment of municipally administered pension funds, the City of Baltimore acted as a market participant . . . . [T]he ordinances do not attempt to interfere with private, commercial transactions between persons engaged in foreign commerce. Rather, the Ordinances simply represent Baltimore City's decision concerning the proper way of investing funds which the City has the authority to administer and which therefore "belong" to the City, although as a Trustee.

[14]The market participant doctrine is based on: (a) "core notions of state sovereignty", Blackmun, J. concurring in *White*, 460 U.S. at 218; (b) the background of the Commerce Clause as a response "principally to state taxes and regulatory measures [such as embargoes, customs, duties and exclusion of imports] impeding free *private* trade in the national market place," *Reeves*, 447 U.S. at 436–37 (emphasis supplied); (c) the feeling that in fairness a state acting as proprietor should "share existing freedoms from federal constraints, including the inherent limits of the Commerce Clause" to the same extent as any other trader, who is permitted "freely to exercise his own independent discretion as to parties with whom he will deal," *Reeves*, 447 U.S. at 438-39; and (d) a "healthy regard for federalism and good government", *id.* at 441, rooted in the residual powers of the States under the Tenth Amendment. Deference is due the state or municipality in a case involving state proprietary action because competing considerations in such cases "often will be subtle, complex, politically charged, and difficult to assess under traditional commerce clause analysis." *Id.* at 439.

P. App. at D-78. The Ordinances are more benign than those measures upheld in this Court's cases applying the market participation doctrine; they do not discriminate in any way in favor of local citizens or against foreign enterprises. They involve only the City's determination of where to invest its funds.

Autonomous fiscal management is the core of state sovereignty, and is a reserved power under the Tenth Amendment. Absent specific congressional legislation exercising a power granted to the federal government by the Constitution (and there is no such legislation here), there is no basis for striking down the decision of the City as to the investments its portfolio should contain. *See Garcia v. San Antonio Metropolitan Transit Authority,* 471 U.S. 1049 (1985). State and local governments have wide latitude to determine how to allocate the resources under their control, even though these allocations may reflect decisions based on social policies and controversial choices. *See Harris v. McRae,* 448 U.S. 297 (1980); *Maher v. Roe,* 432 U.S. 464 (1977). As the Maryland Court of Appeals concluded, based upon the statements of this Court, "just as a private merchant may elect not to deal with companies doing business in South Africa, the City too may make the same choice unhindered by the constraints of the Commerce Clause." P. App. at D-71.

Petitioners' reliance on *South-Central Timber Development, Inc. v. Wunnicke,* 467 U.S. 82, 96 (1984) is misplaced. *Wunnicke* involved a state requirement that any buyer of state timber also process the timber within the state. The requirement was struck down as constituting a regulatory attempt to control the separate timber processing market after the timber was sold; the state was not merely acting as a market participant by selling, but was regulating timber processing that occurred after the State's own market transaction.

B. Even if the Market Participant Doctrine Were Not Applicable, the Ordinances Would Not Violate the Interstate Commerce Clause.

The Ordinances pass muster under the Commerce Clause pursuant to the criteria set out in *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142 (1970), as elaborated in *Maine v. Taylor,* 477 U.S. 131 (1986). Any effect of the Ordinances on interstate commerce is incidental, and they in no wise discriminate against interstate commerce. *Maine v. Taylor,* 477 U.S. at 138. The Ordinances

evenhandedly effectuate legitimate local public interests; and the Maryland Court of Appeals correctly affirmed the trial court's finding that any burden on interstate commerce caused by the Ordinances is certainly not "clearly excessive" in relation to the City's legitimate local interest. P. App. at D-81.

The fact that the Trustees will not buy or hold securities of certain corporations is not a cognizable burden on interstate commerce. The Commerce Clause does not protect particular interstate firms but rather the interstate market. *See Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, 127 (1978). The interstate market is not affected by the Ordinances: "interstate commerce is not subjected to an impermissible burden simply because an otherwise valid regulation causes some business to shift from one interstate supplier to another." *Id.* The pension funds will have no difficulty in making alternative investments. P. App. at D-33.

Any minimal burden on interstate commerce is not excessive in relation to the City's legitimate local interests as identified by the Maryland Court of Appeals and above discussed.

III. The Ordinances Are Not Preempted by Federal Statute or Regulations.

The Ordinances are not preempted by federal law under any of the three bases of preemption recognized by this Court, namely: (1) that a federal statute expressly provides for preemption, (2) that Congress has occupied an entire field of regulatory activity or (3) that state or local legislation actually conflicts with a federal statute or regulation. *See Michigan Canners & Freezers v. Agricultural Board,* 467 U.S. 461, 469 (1983) (federal preemption under Supremacy Clause of state agricultural act).

Petitioners' preemption argument is based essentially on the Comprehensive Anti-Apartheid Act of 1986 (the "Act" or "CAAA"), 22 U.S.C. § 5001, *et. seq.* In fact, the structure of the Act, and congressional statements and actions at the time of passage of the Act, including a resolution of the House of Representatives passed contemporaneously, make clear that Congress not only had no desire to preempt local and state SA divestment legislation, but actually had every intention of permitting such legislation to supplement the CAAA. In no event can Congress be fairly said to have occupied the field. Nor is there such a conflict between federal laws or regulations and the Ordinances as to give rise to preemption.

A. No Federal Statute Expressly or Impliedly Preempts the Ordinances.

Petitioners admit, Petition at 22, that the Act itself contains no language that would expressly preempt the Ordinances. The only preemptive language in the Act is found in Section 606, 22 U.S.C. § 5116, in which the preemptive effect, as the Court of Appeals of Maryland recognized, "is limited to state or local procurement legislation which, as applied, might cause a federally funded contract not to be awarded to the lowest bidder." P. App. at D-51. This limited preemptive provision indicates that Congress' attention was directed to the question of preemption and that, so far the CAAA was concerned, when Congress intended to preempt, it said so. This conclusion is reinforced by the fact that Congress was fully aware of the existence of state and local divestment legislation.[15] *New York State Dept. of Social Services v. Dublino,* 413 U.S. 405, 413-14 (1973) (no preemption where Congress aware of state legislation and does not unambiguously express intent to preempt). It is further buttressed by the rule stated in *New York Tel. Co. v. New York State Dept. of Labor,* 440 U.S. 519, 540 (1979), that with respect to laws "deeply rooted in local feeling and responsibility, in the absence of compelling congressional direction, we should not infer that Congress has deprived the States of the power to act."

The instant case involves a stronger indication of congressional intent than mere absence of express language of preemption. House Resolution 549 (1986), passed at the same time as the CAAA, declared affirmatively that the House intended that the CAAA not preempt even legislation with far more bite than

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[15]*See, e.g.,* 132 Cong. Rec. S9306 (July 17, 1986) (remarks of Senator Moynihan) ("[S]tates and localities should have the right to make their own decisions regarding their own individual involvement with the South African regime."); 132 Cong. Rec. S12533 (Sept. 15, 1986) (remarks of Senator Kennedy).

Additionally, in 1984 the Congress rejected a resolution to exercise its power to disapprove, pursuant to its plenary powers over the District of Columbia, the divestment ordinances of the District of Columbia Council. *See* Hearing and Markups Before the Subcommittee on Fiscal Affairs and Health of the Committee on the District of Columbia, House of Representatives, 99th Cong., 2nd Sess. on H. Con. Res. 216; H. Res. 372.

the Ordinances considered here.[16] When Representative Wheat introduced the Senate-passed bill that became the CAAA along with House Resolution 549, he said:

> . . . [I]t is not the intent of this body to pass any legislation which grants any new constitutional authority. It is merely our intent to make it clear that *this legislation does not impact upon the authority that the States and local governments already have.*

132 Cong. Rec. H6767 (Sept. 12, 1986) (emphasis supplied).

B. No Congressional Legislation Occupies the Field.

In light of the foregoing facts, Petitioners' argument that the CAAA "occupies the field", Petition at 23, "leaving no room", Petition at 22, for the Ordinances, has no substance. Petitioners make much of the word "Comprehensive" in the Act's title. The preamble and the text of the Act itself, however, indicate that Congress intended the Act to be "comprehensive" only to the extent of the federal government's own actions relating to South Africa. Thus, for example, all of the provisions dealing with government procurement refer solely to the "United States Government", *see* CAAA §§ 1314 & 1316, 22 U.S.C. §§ 5064 & 5066, and do not address the subject of investment by local government in securities of SA companies. As this Court said in *Hillsborough County, Fla. v. Auto. Med. Labs,* 471 U.S. 707 (1985):

> . . . [M]erely because the federal provisions were sufficiently comprehensive to meet the needs identified by Congress does not mean that states and localities were barred from identifying additional needs or imposing further requirements in the field. . . .

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[16]The resolution stated:

> Section 2. Upon the adoption of the motion provided for in Section 1, the House shall be considered to have adopted a House resolution containing the text: "Resolved, that in passing the bill, H.R. 4969, as amended by the Senate, it is not the intent of the House of Representatives that the bill limit, preempt, or affect, in any fashion, the authority of any state or local government or of the District of Columbia or of any commonwealth or any territory or possession of the United States or political subdivision thereof *to restrict or otherwise regulate any financial or commercial activity in South Africa.*" (Emphasis supplied).

See also DeCanas v. Bica, 424 U.S. 351, 359–60 (1976) (to the same effect, in a foreign relations power case); *New York State Department of Social Services v. Dublino,* 413 U.S. at 415 (preemption not to be inferred merely from comprehensive character of federal statute, because modern social and regulatory legislation often by its very nature requires intricate and complex responses from Congress); *cf. Container Corp. of America v. Franchise Tax Board,* 463 U.S. 159, 187–88 (1983) (that a course of action neither requiring nor prohibiting certain measures might be preferred on the federal level does not establish intent to preempt the right of states and localities to make their own choice as to whether to employ those measures themselves).

C. The Ordinances Are Not Preempted by Conflict or Inconsistency With Federal Law or Policy.

Preemption by reason of conflict with federal statute or regulation requires either that there be "a physical impossibility" of "compliance with both federal and state regulations", or that the state law constitute "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hillsborough County, Fla. v. Auto. Med. Labs,* 471 U.S. 707, 713 (1985), *quoting Hines v. Davidowitz,* 312 U.S. 52, 67 (1941). Only when the local legislation authorizes conduct that the federal law forbids, or *vice versa* is there a conflict giving rise to preemption. *Michigan Canners & Freezers,* 467 U.S. at 478. There is no such conflict—or indeed any conflict at all—here. The CAAA does not limit public or private bodies in connection with divestment of securities of SA companies. It prohibits outright certain activities, *e.g.*, new investment by American companies in South Africa, and certain imports from and exports to South Africa. It neither requires any company to continue doing business in South Africa nor prohibits any company from continuing to do so. It does require those American companies that choose to remain in South Africa to adhere, at a minimum, to certain standards known as the "Sullivan principles". It neither requires nor prohibits divestment by anyone. Compliance with both the CAAA and the Ordinances presents no "physical impossibility"; nor do the

Ordinances stand as an obstacle to the accomplishment and execution of the full purposes and objectives of the Act.[17]

IV. The Ordinances Do Not Contravene the Foreign Relations Power or the Foreign Commerce Clause of the Federal Constitution.

A. The Ordinances Do Not Infringe the Federal Foreign Relations Power.

Petitioners' "foreign relations power" argument, like their other arguments, suffers from the basic flaw of being premised on a misstatement of the Ordinances' nature, force and effect. The law in this area is bounded by two cases: *Clark v. Allen*, 331 U.S. 503 (1947) (no infringement) and *Zschernig v. Miller*, 389 U.S. 429 (1968), *reh'g denied*, 390 U.S. 974 (1968) (infringement). *Zschernig* is the only case decided by this Court invalidating a state action not violative of a federal statute, treaty or executive agreement. *Cf. United States v. Pink*, 315 U.S. 203 (1942) (U.S.-Soviet treaty); *Hines v. Davidowitz*, 312 U.S. at 67 (federal law on aliens); *see also* Note, *The Supreme Court 1967 Term*, 82 HARV. L. REV. 63, 245 (1968). The instant case is far over on the *Clark v. Allen* side of the line; the Ordinances are even less intrusive than the state statute in *Clark v. Allen* upheld by this Court.

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[17]Petitioners' quotation of Reagan administration officials on the policy of "constructive engagement", Petition at 24 & n.7, is no basis for arguing preemption. Such general expressions by executive appointees preempt nothing. The only conflict that can preempt is conflict with a specific federal statute. *See International Paper Company v. Ouellette*, 479 U.S. 481 (1987); *Hillsborough County, Fla. v. Auto. Med. Labs*, 471 U.S. 707 (1985) (federal regulations); *Pacific Gas & Electric v. State Energy Resources Conserv. & Dev. Comm'n*, 461 U.S. 190, 220-22 (1983) ("national policy" to promote commercial use of nuclear power did not preempt traditional state utility regulation); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 634 (1981); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 129–34 (1978) ("national policy" in favor of competition did not preempt state requirement that oil companies get out of service station business where that requirement was not in conflict with any federal statute); Madison, *The Federalist No. 51* ("In government, the legislative authority necessarily predominates"). If the pronouncements relied on by Petitioners ever had any force, the subsequent enactment of the CAAA has sapped that force and repudiated "constructive engagement" by applying sanctions on a nationwide basis.

Traditionally, there has been a substantial body of valid state and local law "that involves matters of significant concern to foreign relations." Restatement (Second) of Foreign Relations Law §2(1) (c). Comment *d* to the Restatement, Section 2, states:

> Relation between federal and state law. The Foreign Relations Law of the United States is not confined to federal law. The domestic law referred to in this Section includes the law of the several states of the United States. Where the Constitution does not vest exclusive jurisdiction in the federal government, and where Congress has not acted to "occupy the field," a state may prescribe and enforce rules of law involving matters of significant concern to foreign relations.

Thus, state courts traditionally examine judicial proceedings of foreign countries to determine whether to enforce a foreign judgment, and may refuse to enforce any foreign law that offends the forum's public policy. *See Bond v. Hume,* 243 U.S. 15, 21 (1970) (state need not enforce contract founded upon foreign law "where to do so would be repugnant to good morals"); *United States v. Pink,* 315 U.S. at 230–31 (in absence of contrary federal law or treaty, states may refuse to enforce rights based on foreign law which runs counter to the public policy of the forum); *Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda), Ltd.,* 37 N.Y.2d 220, 371 N.Y.S.2d 892, 333 N.E.2d 168 (1975), *cert. denied,* 423 U.S. 866 (1975) (confiscation by Uganda not recognized as defense); Uniform Foreign Money Judgment Recovery Act §4(a) (1) (judgments not recognized if "rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law").

Clark v. Allen, 331 U.S. 503 (1947), held that a state may condition the right of foreign nationals to inherit property on the reciprocal grant by the foreign country of the same right to U.S. citizens. After noting that rights of succession to property are essentially matters of local law and that there was no applicable conflicting federal treaty or policy, as there was in *Hines v. Davidowitz,* 312 U.S. 52 (1941) (upon which Petitioners rely), the Court said in *Clark,* 331 U.S. at 517:

> Nor has California entered the forbidden domain of negotiating with a foreign country, *United States v. Curtiss-Wright Export Corp.,* 299 U.S. 304, 316, 317, . . .

> or making a compact with it contrary to the prohibition of Article 1, Section 10 of the Constitution. What California has done will have some incidental or indirect effect in foreign countries. But that is true of many state laws which none would claim cross the forbidden line.

Zschernig, on the other hand, involved an Oregon statute escheating the inheritance claims of a non-resident alien if the alien's country of origin did not give a reciprocal right of inheritance to U.S. citizens, or if the alien's inheritance would be subject to "confiscation" by the foreign government. The Court struck the statute down, noting that Oregon, in applying its statute, passed judgment on, *inter alia,* the relationship between foreign countries and their nationals, the *bona fides* of representations of fact by foreign nations, and the credibility of foreign officials. The Court expressly pointed out that statutes of this kind had in fact provoked foreign protest. *Zschernig,* 389 U.S. at 347 n.7. The Court concluded that the application of the statute "affects international relations in a persistent and subtle way", 389 U.S. at 440, and permits the "state, speaking through its probate courts to establish its own foreign policy." 389 U.S. at 441.

Zschernig explicitly acknowledged the correctness of *Clark v. Allen,* and distinguished it on the basis that the *Zschernig* statute represented a much more vigorous intrusion into foreign affairs than the California statute.

The Maryland Court of Appeals in the instant case affirmed the trial court's application of the teachings of this Court's cases. The courts below spelled out the absence here of the intrusive features that were the bases for the holding in *Zschernig.* Unlike the statute in *Zschernig,* the Ordinances here "represent 'a single general decision'" by the City, P. App. at D-61, and require no case-by-case investigation or assessment of, or commentary on, the laws or operations of any foreign government by local government officials or employees. P. App. at E-13-14. Unlike *Zschernig,* which involved the exercise of "a state's regulatory power", the Ordinances here "involve[d] the exercise of a local government's proprietary power." *Id.* at E-14. Unlike *Zschernig,* where the statute operated directly on foreign nationals, the Ordinances operate directly only on the Trustees. *Id.* at E-15. The effect of the Ordinances on South Africa is indirect, minimal, and less than a featherweight when compared to the direct sanctions enacted by Congress in the CAAA, with which the Ordinances operate not in conflict but in tandem.

Cases after *Zschernig* have established that *Zschernig* is a precedent of limited force and the product of a particular period in the Cold War. In *Container Corp. of America v. Franchise Tax Board,* 463 U.S. 159, 197 (1983), this Court upheld a California franchise tax on a multinational corporation. The tax was based on the unitary business concept reflecting payroll, property and sales of the taxpayer's foreign subsidiaries. The Court found that the tax, with its possibility of double taxation (which actually occurred in that case) and the possibility of foreign retaliation have "foreign resonances but do not implicate foreign affairs." 463 U.S. at 194. The Court reasoned, *inter alia,* that (a) the threat of retaliation was not "significant", *id.,* and (b) the tax was imposed, not on a foreign entity but on a domestic corporation", *id.* at 195, although income arguably attributable to foreign corporations was "counted" in calculating the taxable income of the domestic corporation. *Id.*

Again, *Reeves, Inc. v. Stake,* 447 U.S. 429, 445 (1980) cited with approval *K.S.B. Technical Sales Corp. v. North Jersey Water Supply Comm'n,* 75 N.J. 272, 381 A.2d 774 (1977), which upheld New Jersey's "Buy-American" statute requiring state government agencies to purchase only American-made products. Also, in *DeCanas v. Bica,* 424 U.S. 351 (1976), this Court, without even citing *Zschernig,* upheld state regulation of the employment of foreign nationals, pointing out that even if "local regulation has some purely speculative and indirect impact" on foreign affairs, "it does not thereby become a constitutionally proscribed regulation." 424 U.S. at 355-56.

Finally, in *Gorun v. Fall,* 393 U.S. 398 (1969), this Court summarily affirmed the decision of a three-judge district court, *Gorun v. Fall,* 287 F. Supp. 725 (D. Mont. 1968), which dismissed a complaint attacking a Montana reciprocal inheritance statute that conditioned the inheritance rights of Romanian nationals on a showing that Romania allowed United States citizens to receive, and enjoy in the United States, property bequeathed in Romania. The Court declined to invalidate the statute, because *Zschernig* provided guidelines for the Montana court to "fashion a procedure for applying . . . [the Montana statute] in a manner not offensive to the federal Constitution." 287 F. Supp. at 728. The district court correctly perceived that what made the Oregon statute in *Zschernig* invalid was the way it was administered. *Gorun* is dispositive here, and in the event this Court is disposed to grant certiorari, this Court's disposition of the instant case should be the same as its disposition of *Gorun.*

Interestingly, none of the foreign relations power cases decided by this Court after *Zschernig* is even mentioned in the Petition. The state cases relied upon by Petitioners are inapposite because they involve regulation, taxation or direct denial of rights of foreign and/or American nationals.[18]

B. The Ordinances Do Not Contravene the Foreign Commerce Clause.

The U.S. Constitution, art. I, § 8, cl. 3 provides that "the Congress shall have power . . . to *regulate* commerce with Foreign Nations. . . ." (Emphasis supplied). This clause bars state laws that "prevent . . . the federal government from speaking with one voice when *regulating* commercial relations with foreign governments." *Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434, 451 (1979) (emphasis supplied). The short answer to Petitioners' argument is that the Ordinances do not regulate, or even purport to regulate, any aspect of foreign commerce. They merely govern the investment of City funds.[19]

Even if the Ordinances could be said to regulate foreign commerce, and regardless of how rigorous the scrutiny to which they are subjected, they would survive review under the standards set forth by this Court.

The two leading cases on the Foreign Commerce Clause are *Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434 (1979) and *Container Corp. v. Franchise Tax Board,* 463 U.S. 159 (1983). Both cases involved state taxes that implicated foreign commerce. In *Japan Line,* this Court invalidated a California tax that fell on a Japanese vessel engaged entirely in foreign commerce even though the tax was formulated on the basis of the vessel's contacts with California ports. The tax conflicted with a treaty

[18]*Springfield Rare Coin Galleries, Inc. v. Johnson,* 115 Ill.2d 221, 503 N.E.2d 300 (1986) (discriminatory use tax on South African coins); *New York Times Co. v. City of New York Comm'n on Human Rights,* 41 N.Y.2d 345, 393 N.Y.S.2d 312, 361 N.E.2d 963 (1977) (prohibition of advertisement in New York of employment opportunities in South Africa).

[19]The questions raised in *Reeves, Inc. v. Stake,* 447 U.S. 429 (1980) and in *South Central Timber Development Co. v. Wunnicke,* 467 U.S. 82, 96 (1984) as to whether the market participant doctrine applies to foreign as well as interstate commerce, and whether laws regulating foreign commerce are subject to "more rigorous" scrutiny than laws regulating interstate commerce are irrelevant because the Ordinances do not regulate commerce at all.

between the United States and Japan and thus prevented this country from "speaking with one voice" in the regulation of foreign commerce. *Japan Line,* 441 U.S. at 453. By comparison, in *Container Corp.,* this Court upheld a franchise tax imposed on a Delaware corporation engaged in domestic and foreign commerce. The Court distinguished *Container Corp.* from *Japan Line* on the basis that *Container Corp.* involved a tax on a domestic corporation, with only indirect and speculative effects on foreign commerce, whereas the tax in *Japan Line* was applied directly to a foreign national corporation and contravened a federal treaty.

The Maryland Court of Appeals correctly concluded that the instant case is closer to *Container Corp.* than to *Japan Line.* In fact, the state tax upheld in *Container Corp.,* as attenuated and speculative as this Court found its effect on foreign relations to be, was far more intrusive than the Ordinances challenged here by Petitioners.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied. In the alternative, should this Court issue the Writ, Respondent suggests that the issues raised by the Petition are appropriate for summary disposition, and urges summary affirmance of the decision of the Maryland Court of Appeals.

Respectfully submitted,

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APPENDIX A

CHARTER OF BALTIMORE CITY

ARTICLE II

Art. II, § 1

GENERAL POWERS

The Mayor and City Council of Baltimore shall have full power and authority to exercise all of the powers heretofore or hereafter granted to it by the Constitution of Maryland or by any Public General or Public Local Laws of the State of Maryland; and in particular, without limitation upon the foregoing, shall have power by ordinance, or such other method as may be provided for in its Charter, subject to the provisions of said Constitution and Public General Laws:

* * *

(24) PENSIONS.

(a) To establish and maintain a general system of pensions and retirement benefits for the officers and employees of the City, the Police Department of Baltimore City, the Enoch Pratt Free Library, the Walters Art Gallery, the Baltimore Museum of Art, the Municipal Museum of Baltimore City, and the officers and employees, by whatever authority appointed, whose compensation is paid by the City; to fix the terms of and restrictions on admission to such system and the classifications therein; to provide for the separate maintenance, or inclusion in such general pension system, of any existing pension system (with the consent of a majority of its participants) for officers and employees, by whatever authority appointed, whose compensation is paid by the City; to provide that persons eligible for admission in such general pension system shall not be eligible, except as hereinafter provided, for admission to any other pension system, the revenues of which are derived wholly or in part from appropriations made by the City, from license fees or from fines and forfeitures imposed under laws or ordinances in force in Baltimore City; to provide, in connec-

tion with such general pension system, a system of benefits payable to the beneficiaries and dependents of any participant in such general pension system after the death of such participant (whether accidental or otherwise and/or whether occuring in the actual performance of duty or otherwise, subject to such exceptions, conditions, restrictions and classifications as may be provided by ordinance; provided, however, (1) that upon the adoption of an ordinance providing for their participation in the general pension system, officers and employees of said Police Department who do not elect to participate in such general pension system shall be entitled to pensions, benefits or allowances for themselves, their widows or dependents, under laws or ordinances in force immediately prior to the adoption of such ordinance; and (2) that nothing in this subsection shall operate or be construed to diminish in any way the rights of any members of the Fire Department who are not participants in the presently existing general pension system of the City, their widows or dependents, to pensions, benefits or allowances provided for by laws or ordinances in force as of January 1, 1926.

(a-1) To establish and maintain a separate system of pension and retirement benefits for elected officials of Baltimore City; to fix the terms of and restrictions on admission to that system and the classifications therein; to provide that persons eligible for admission in that pension system shall not be eligible to receive credit for the same years of service for which they received credit in any other pension system supported wholly or in part by the City of Baltimore or State of Maryland; to provide for the optional transfer to that pension system of any elected official who is eligible to join it, from any other system of pensions and retirement benefits operated and maintained by the Mayor and City Council of Baltimore; to provide in connection with that pension system, benefits payable to the beneficiaries and dependents of any participant in that pension system after death of that participant (whether accidental or otherwise occuring in the actual performance of duty or otherwise), subject to any exceptions, restrictions and classifications that may be provided by ordinance; provided, however, that upon the adoption of an ordinance providing for

their participation in that pension system, eligible elected officials who do not elect to participate in that pension system, shall be entitled to the pensions, retirement benefits and other benefits or allowances, for themselves, their widows and dependents, under the laws or ordinances in force immediately prior to the adoption of that ordinance.

(b) To establish and maintain a new system of pensions and retirement benefits applicable to all future entrants into the service of the City of Baltimore, whose entrance therein occurs after the establishment of such new system who desire to be covered by the provisions of the Federal Social Security Act and who are not specifically excluded therefrom may elect to enter such new system, during which members of the existing system may transfer to such new system; to provide for the transfer to such new system of the reserves help in the existing system on account of members who so transfer; provided, however, that the benefits of any member of the existing system shall not be changed by reason of his coverage under Social Security without his consent; and provided further that except as this paragraph specifically provides otherwise, and except where inconsistent herewith, the provisions of paragraph (a) of this subsection (24) concerning the existing system shall apply to such new system.

(c) Until amended by ordinance, the presently existing pension system of the City shall remain in force. (Ch. 702, 1982 Acts of the General Assembly)

(25) Pensions for School Cafeteria Employees. To grant to any and all persons regularly employed in, or associated with, any cafeteria system or department operated in connection with the public school system of the Mayor and City Council of Baltimore, such of the benefits and advantages of the Employees' Retirement System of the City of Baltimore, established by Ordinance No. 553, approved February 1, 1926, and amendments thereto, as the Mayor and City Council of Baltimore may by ordinance provide, except the the Retirement System shall not be liable for the payment of any any pensions or other benefits on account of said persons, for

which reserves have not been previously created from funds contributed specifically for such benefits by the City or said persons. Provided, that any ordinance passed under authority of this paragraph may provide that every such person shall be entitled to credit for all service rendered prior to January 1, 1926, and for one half of all service rendered between January 1, 1926, and the date of admission of the said Employees' Retirement System; provided, further, that any ordinance passed under authority hereof shall provide that any such person who shall become employed in, or associated with, any such cafeteria system or department after the passage of said ordinance shall, before becoming a member of the said Employees' Retirement System of the City of Baltimore, first submit to a medical examination similar to that required for employees in the Classified Service of the City of Baltimore.

(26) PENSIONS FOR POLICEMEN AND FIREMEN. To establish and maintain a separate system of pensions and retirement benefits for such officers and employees of the Department of Aviation, of the Police Department and of the Fire Department of Baltimore City as may be designated or described by Ordinance of the Mayor and City Council of Baltimore; to fix the terms of and restrictions on admission to such system and the classifications therein; to provide that persons eligible for admission in such pension system shall not be eligible except as hereinafter provided for admission to any other pension system, the revenues of which are derived wholly or in part from appropriations made by the City, from license fees or from fines and forfeitures imposed under the laws or ordinances in force in Baltimore City; to provide for the optional transfer to such pension system of any officer or employee of either the Department of Aviation, the Police Department or the Fire Department of Baltimore City who is eligible to join such separate pension system, from any other system of pensions and retirement benefits operated and maintained by the Mayor and City Council of Baltimore; to provide in connection with such pension system, a system of benefits payable to the beneficiaries and dependents of any participant in such pension system after the death of such participant (whether accidental or otherwise and/or whether occuring in the actual

performance of duty or otherwise), subject to such exceptions, conditions, restrictions and classifications as may be provided by ordinance; provided, however, (1) that upon the adoption of an ordinance providing for their participation in such pension system, eligible officers and employees of the Department of Aviation, of the Police Department and of the Fire Department who do not elect to participate in such pension system, shall be entitled to the pensions, retirement benefits, other benefits or allowances for themselves, their widows or dependents, under the laws or ordinances in force immediately prior to the adoption of such ordinance; (2) nothing in this subsection shall operate or be construed to diminish in any way the rights of any eligible members of the Police Department or of the Fire Department who are not participants in the presently existing general pension system of the City of Baltimore, their widows or dependents, to pensions, retirement benefits, other benefits or allowances provided for by laws or ordinances in force as of January 1, 1926. Until amended by ordinance, the presently existing pension and retirement systems of the City shall remain in force. The provisions of this subsection shall be deemed to be in addition to and not in substitution of any other powers or authorizations now conferred upon the Mayor and City Council of Baltimore.

[1964 Revision]

APPENDIX B

BALTIMORE CITY CODE

ARTICLE 22

Retirement Systems

* * * *

7. Management of funds.

(a) Trustee of funds.

The Board of Trustees shall be the trustees of the several funds of the Employees' Retirement System of Baltimore created by Article 22 under this subtitle as provided in Section 8. The Board of Trustees shall have the power to invest and reinvest such funds in the following types or classes of assets subject to the limitations, if any, as set forth with regard to each type or class of investment.

* * *

(1) Deposits in savings accounts, or other evidences of deposit in national or state banks and trust companies. To the extent that such an investment or account is insured by the Federal Savings and Loan Insurance Corporation, or by the Maryland Savings Share Insurance Corporation, said Trustees may invest in shares of savings and loan associations or building and loan associations in the State of Maryland.

(2) Interest-bearing bonds, notes, certificates of indebtedness, bills or other direct interest-bearing obligations fully guaranteed both as to principal and interest by the United States of America, or by Canada, and obligations of the Internation Bank for Reconstruction and Development and obligations of the Inter-American Development Bank.

(3) Interest-bearing bonds of any state, District of Columbia, territory or possession of the United States of America, or

of any province of Canada, or of any county, or incorporated city of any state, District of Columbia, territory or possession of the United States of America, or any Canadian municipality.

(4) Interest-bearing bonds on any commission, instrumentality, authority or political subdivision having legal authority to issue the same of the the United States of America, Canada, any state, District of Columbia, territory or possession of the United States of America or of any province of Canada, or of any county or incorporated city of any state, District of Columbia, territory or possession of the United States of America or of any province of Canada.

(5) Interest-bearing bonds, notes or other interest-bearing obligations of any corporation organized under the laws of the United States of America or of Canada or province thereof, or under the laws of any state, District of Columbia, territory or possession of the United States of America. Equipment trust obligations or certificates or other secured instruments evidencing an interest in transportation or other equipment wholly or in part within the United States of America or Canada with a right to receive determined portions of rental, purchase price or other fixed obligatory payments for the use or purchase of such transportation or other equipment.

(6) Publicly-traded preferred or common stock or shares of any corporation created or existing under the laws of the United States of America, Canada or province thereof, or of any state, District of Columbia, territory or possession of the United States of America; provided however, that such investments in stock shall not exceed fifty percent (50%) of the total market value of all the assets of the funds of the Employees' Retirement System referred to herein. An evaluation of the total assets of the Retirement System shall be made at least once in every three (3) months, for the purposes of maintaining this fifty percent (50%) limitation.

(7) Covered call options may be sold by the Employees' Retirement System when the underlying common stock is held in the equity portfolio and when such options are actively

traded on a public exchange, provided, however, that options are not sold on more than twenty-five percent (25%) of the total market value of common stocks held in the portfolio. Purchase of options will be permitted only when closing out a previously written covered call option.

* * *

(8)(i) Loans secured by first mortgages, or deeds of trust, or unencumbered fee-simple or improved leasehold real estate in the District of Columbia or in any state of the United States of America or province of Canada. Whenever such loans are made upon fee-simple, or leasehold real estate which is improved by a building or buildings, the said improvements shall be incurred against loss by fire and such other casualties as are included in extended coverage policies, and the said insurance policies shall contain the New York or Massachusetts standard mortgage clause or one equivalent thereto and shall be delivered to the mortgagee as additional security for the said loans. Bonds, notes, or other evidence of indebtedness secured by mortgages or deeds of trust which are guaranteed or insured by an instrumentality of the United States pursuant to acts of Congress, as heretofore and hereafter amended, known as the National Housing Act, Servicemen's Readjustment Act of 1944, and Bankhead-Jones Farm Tenant Act; and neither the limitations of this section nor any other law of this State requiring security upon which loans shall be made, or prescribing the nature, amount or forms of such security, or limiting the interest rates upon loans, shall be deemed to apply to such insured or guaranteed mortgage loans. Provided, however, that such investments in mortgages shall not exceed twenty-five percent (25%) of the total market value of all the assets of the funds of the Employees' Retirement System referred to herein and evaluation of the total assets of the Retirement System shall be made at least once in every three (3) months, for the purpose of maintaining this twenty-five percent (25%) limitation. Upon a foreclosure of its own mortgages or an acceptance of a deed in lieu of foreclosure by the Trustees, the said Trustee shall have the right to purchase, hold, operate, lease, manage and/or sell the subject real estate.

(ii) Open and closed-end real estate investment pools, direct real estate investments, and unrestricted mortgage investments with equity participation. Such investments shall be included in the twenty-five percent (25%) restriction of market value of assets provided for in Section 7(a)(8)(i), with the further limitation that these investments shall not exceed ten percent (10%) of the market value of all the assets of the Retirement System Funds.

Provided, however, if any such investment is in the nature of a "real estate investment pool," as defined hereinafter, then such investment shall be subject to the following restrictions:

1. With the exception of an insurance company, the investment manager shall either be registered as an investment advisor or function through an investment advisor registered with the Securities Exchange Commission under the Investment Advisors Act of 1940.

2. With the exception of an insurance company, all funds of the real estate investment pool shall be held in a trust wherein the investment manager, trustees, and all persons or entities responsible for the management, control, custody, maintenance, or investment of the funds, or having any similar responsibility in the pool, shall function in a fiduciary capacity in their relationship to the unit holders or investors in the pool.

3. If the investment is in a insurance company's real estate investment pool, the insurance company shall have the highest rating of A.M. Best Co., and all persons or entities responsible for the management, control, custody, maintenance or investment of the funds, or having any similar responsibility, shall function in a fiduciary capacity in their relationship to the unit holders or investors in the pool.

4. The trust agreement shall be tax exempt under the applicable provisions of the Internal Revenue Code, Sections 401 and 501(a) or subsequent amendments or revisions thereto. In the case of insurance company pools, the pools shall satisfy the applicable requirements of the Internal Revenue Code, as amended, so that the insurance company does not pay

federal income tax on the earnings of the separate accounts of such pools.

5. The trust funds of the real estate investment pool shall be immune from suit, and exempt from attachment by any creditors of any person, corporation or other entity that is responsible for the management, custody, control, maintenance, or investment of the funds, or having any similar responsibility in said pool, under any local, state, or federal law. Title to all assets of a separate account of an insurance company's real estate investment pool shall be held solely in the corporation name of the insurance company itself, and under applicable law such assets shall not be chargeable with liabilities arising out of any other business which the insurance company may conduct.

6. The real estate investment pool trust or any other agreement for such investment shall not violate the provisions of Internal Revenue Code Sections 401 and 501(a) or any subsequent revisions or amendments thereto, under which the Employees' Retirement System is qualified.

7. All unit holders or qualified investors in such a pool shall be pension or employee benefit plans or trusts qualified under Internal Revenue Code, Section(s) 401 and/or 501(a), or a governmental plan under Sections 414(d) and/or 818(a)(6).

8. For the purposes of this section, a real estate investment pool shall mean any investment wherein the Retirement System places certain funds into a commingled trust, or a commingled separate account of a life insurance company, and wherein the trust or insurance company utilizes said funds to make certain real estate investments in the District of Columbia, or in any state of the United States of America or province of Canada, and wherein each investor owns through units a certain equity in the investments.

* * *

(9) Ground rent in the State of Maryland.

(10) Interest, rents or other fixed income due and accrued on any of the investments authorized in the preceding subsections.

The Board of Trustees shall have the duty and responsibility of periodically determining investment policies consistent with the above limitations, the capital market environment, and the actuarial characteristics of the Employees' Retirement System and to publish such investment policy guidelines by filing a copy thereof with the Department of Legislative Reference of Baltimore City, and after January 1, 1979, also by publication in the Municipal Journal.

All contributions from time to time paid into the several funds, and the income thereof, without distinction between principal and income, shall be held and administered by the Board of Trustees or its agents in the funds, and the Board shall not be required to segregate or invest separately any portion of the funds.

Provided, however, that nothing in this amendatory ordinance shall be deemed to render illegal or to invalidate the making and holding of any investment heretofore made and now remaining in said funds where such investment when made was authorized by law prior to the enactment of this amendatory ordinance; and provided further, that nothing herein shall be deemed to prevent the Board of Trustees from accepting, in lieu or substitution of securities representing investments heretofore validly made, other securities not of the kind enumerated but authorized by ordinance as investments for the said Board prior to the enactment of this amendatory ordinance, where the Board shall deem such substitution of securities desirable to preserve the investment of the funds.

Subject to the terms, provisions and conditions contained herein, said Trustees shall have full power to hold, purchase, sell, assign, transfer, and dispose of any of the securities and investments in which any of the funds created herein

shall have been invested, as well as the proceeds of said investments and any moneys belonging to said funds.

(11) Short Term Investment Funds established, operated and maintained by the contract custodian of the assets of the Employees' Retirement System, for the collective investment and re-investment of funds received and held by it as Trustee, Co-Trustee, or in any other fiduciary capacity described in Subtitle 5 of Title 3 of the Financial Institutions Article of the Annotated Code of Maryland (1980 Volume), or any amendment, supplement, or successor thereto or recodification thereof, which Short Term Investment Fund has been qualified under the provisions of Section 401(a) and exempt from Federal income taxation under Section 501(a) of the Internal Revenue Code of 1954, as amended, and which is used as a temporary investment/cash management vehicle; provided that investment in such Short Term Investment Fund may be made from uninvested cash reserves held by the contract custodian, or from funds designated by the Investment Managers of the Employees' Retirement System funds. In connection with the participation of the Employees' Retirement System in Short Term Investment Fund, where required by law or the terms of the Short Term Investment Fund, the Declaration of Trust establishing such Short Term Investment Fund is hereby adopted and made a part of the Employees' Retirement System to the extent such instrument does not violate the Internal Revenue Code or other applicable law and does not affect the tax qualification of the Employees' Retirement System, and any funds of such System invested in the Short Term Investment Fund shall be subject to all the provisions thereof, as the same may be amended from time to time.

(12) Asset Lending of securities which are under the custody of the contract custodian of the assets of the Employees' Retirement System, provided that: (i) such securities are loaned in accordance with the procedures set forth in the Department of Labor Prohibited Transaction Exemption 81-6 Ruling (PTE 81-6), or applicable successor regulations; (ii) the Board of Trustees shall approve or authorize the designated Investment Managers to approve the securities to be loaned,

the brokers to whom such securities are loaned, and the collateral to secure assets loaned; and provided further, that before any such assets are loaned, the Board of Trustees and the Director of Finance shall, pursuant to PTE 81-6 procedures enter into a master loan agreement with the contract custodian setting forth the procedures to be followed; the broker to whom such securities will be loaned; collateral arrangements; fees; and other applicable prior to execution by the Board of Trustees, by the Director of Finance as the designated custodian of the assets of the Employees' Retirement System, by the City Solicitor and the Board of Estimates; provided, however, that the market value of securities loaned shall not exceed twenty-five percent (25%) of the total market value of all assets of the Employees' Retirement System on any day.

* * *

(13)[1] (i) On the first day of the third quarter of fiscal year 1987, no monies or funds held under any provisions of the Retirement System shall remain invested or hereinafter be invested in the stocks, securities or other obligations of any bank or financial institution which makes loans to the Republic of South Africa or Namibia, or to a national corporation of the Republic of South Africa or Namibia, or in the stocks, securities, or other obligations of any company doing business in or with the Republic of South Africa or Namibia, or whose subsidiary or affiliate does business in or with the Republic of South Africa or Namibia.

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[1]Sections 2 and 3 of Ord. 765, 1986 provide as follows:

"Sec. 2. And be it further ordained,

(a) That, subject to the provisions of this section, the divestiture required by Section 1 of this ordinance shall be completed with the time limit established in this ordinance.

(b) That the time limit shall begin on the first day of the third quarter of fiscal year 1987.

(c) That during the time limit the Board of Trustees of the retirement systems shall make quarterly reports to the Mayor and City Council concerning the progress of divestiture.

(d) That, during the time limit, the Board of Trustees of the retirement systems may from time to time suspend the divestiture program provided the suspending Board adopts a resolution pursuant to this section.

(ii) Business entities doing business in or with the Republic of South Africa shall be identified by reference to the most recent annual report of the African Fund entitled "Unified List of United States Companies with Investments or Loans in South Africa and Namibia".

(iii) Business entities doing business in or with the Republic of Namibia shall be identified through correspondence with the United Nations' Office of the Commissioner for Namibia and the United Nations' Center for Transnational Corporations.

(b) Interest. As of July 1, 1978, the Trustees will determine the "carrying value" of the Fund in accordance with the asset valuation method theretofore employed and the "adjusted market value" of the Fund representing an average fair market value of that date.

During the 1979 fiscal year, the Trustees will establish a "Reserve for Book Value" as of July 1, 1978, equal to the difference as of that date between the carrying value and the

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(e) That when a Board of Trustees of either retirement system adopts a resolution suspending the divestiture program under this section, the suspending Board shall find as follows:

(1) That the rate of return on the funds are substantially lower than the average of the annual earnings on the funds over the past five years, and

(2) That continued divestiture under this ordinance will be inconsistent with generally accepted investment standards for conservators of pension funds notwithstanding the intent of this ordinance, or

(3) That divestiture under the divestiture program will cause financial losses to the funds.

(f) That when a Board of Trustees of the retirement systems adopts a resolution suspending the divestiture program under this section, the resolution shall:

(1) State the standards and conclusions for the suspension;

(2) Set forth the duration of the suspension and the time of resumption of the divestiture program; however, the period of suspension shall not exceed 90 days and the time limit shall be tolled for the period of suspension; and

(3) Be in writing and shall be sent to the Mayor, President of the City Council, and the Department of Legislative Reference.

Sec. 3. And be it further ordained, That the time limit for divestiture under this ordinance is 2 years."

adjusted market value of the Fund. On that date and on each annual valuation date thereafter, the value of the Fund assets for actuarial valuation purposes will be carried at (1) the then current adjusted market value, plus (2) the Reserve for Book Value.

The Board of Trustees annually shall credit regular interest less the investment management, custodian and investment adviser costs on the mean amount for the preceding year in each of the funds. After payment of pension fund management, custodian, and investment adviser services as provided in Section s 7(g) and 43 (a), any excess of the earnings of the funds of this Retirement System as determined in accordance with an appropriate asset investment adviser services as provided in Sections 7(g) and 43 (a), any excess of the earnings of the funds of this Retirement System as determined in accordance with an appropriate asset valuation method giving effect to actual earnings of the funds, over the earnings based on the regular interest rate used for valuation purposes, shall first be applied by the Board of Trustees to meet the conditions of any asset averaging method then in use under the System.

An additional amount equal to one and one-half percent of the mean amount for the preceding year in each of the funds will be deducted from the remaining excess earnings, if any, and applied by the Board of Trustees to reduce the remaining balance, if any, in the "Reserve for Book Value"; to the extent that excess earnings are less than one and one-half percent per annum, the City of Baltimore shall contribute the difference to the "Reserve for Book Value", averaged over a five year period in accordance with the asset valuation method heretofore employed. The remaining excess earnings, if any, shall next be applied by the Board in such amount or amounts as they determine (1) to decrease the amount contributed by the City of Baltimore, and/or (2) to decrease the period over which the unfunded accrued liability will be amortized as provided in Section 8(c)(3), and/or (3) to reduce the remaining balance, if any, in the "Reserve for Book Value". Any deficiency of the earnings of the funds of this Retirement System, as deter-

mined in accordance with an appropriate asset valuation method giving recognition to actual earnings of the funds, below the required earnings based on the regular interest rate used for valuation purposes shall first be applied to meet the conditions of any asset averaging method then in use under the System; the remaining deficiency in earnings, if any, shall be applied by the Board of Trustees in such amount or amounts as they determine either (1) to increase the amount contributed by the City of Baltimore, and/or (2) to increase the period over which the unfunded accrued liability will be amortized as provided in Section 8(c)(3).

The increase or decrease of contribution and/or the increase or decrease in length of amortization period shall be determined by the Board after receiving the advice of the actuary engaged by the City, on the basis of regular interest rate used for valuation purposes, and of such mortality and other tables as shall be adopted by the Board of Trustees.

The Board of Trustees shall use such portion of the net unallocated interest surplus (if any), which has not been used to reduce the City's contribution or the unfunded actuarial liability, as is deemed necessary by the actuary to cover the cost to the City of Baltimore which may result from the implementation of Ordinance 988, 1987, (City Council Bill No. 1598) effective July 1, 1987 as it affects benefits for current members as of the date of enactment of the ordinance. All other costs of Ordinance 988, 1987, shall be provided for in the same manner as otherwise described in this section.

* * *

(c) Cash on Deposit. For the purpose of meeting disbursements for pensions, annuities, and other payments, there may be kept available cash on deposit in one or more banks or trust companies located in the City of Baltimore, organized under the laws of the State of Maryland or of the United States, in such amount as the Trustees may by resolution from time to time adopt, not exceeding a sum equal to the estimated disbursements projected for a period of fifteen days. The sums on

deposit in bank shall be secured by collateral posted by the depositories of such type and amount as the Commissioners of Finance may prescribe, but in no event shall the market value of such collateral be less than one hundred percent of the amount on deposit according to the depositories' records. In exercising this authority for bank deposits, the Trustees shall endeavor to minimize the amount of such deposits, and shall consider appropriate money management techniques, including wire transfers of funds and the zero-balance-fee-for-service method of maintaining bank accounts. In no event shall the bank accounts be used as the basis for, or form part of the basis for fees for the investment administrators or be used to provide supplementary compensation for such investment administrators.

(d) Securities Handling. The Custodian designated in the Charter of Baltimore City (1964 Revision, as amended) may cause any investment in securities held by the Trustees to be registered in or transferred into the name of the Trustees or into the name of such nominee as the Custodian may direct, including a nominee partnership created by the Board of Trustees, or the Custodian may retain them unregistered and in form permitting transferability, and further may authorize its contractual agents to deposit securities with "clearing corporations" as defined in Section 8-102 of Article 95B of the Annotated Code of Maryland for the express purpose of having such clearing corporations act as centralized depositories for such securities, but the books and records of the Custodian and its contractual agents shall at all times show that all such investments are part of the several funds of the Employees' Retirement System. The authority to make use of a clearing corporation shall include the authority to utilize the "book entry" system of the United States Government, and agencies thereof, for which the Federal Reserve Bank is the authorized fiscal agent.

(e) Conflicts of Interest. Except as otherwise herein provided, no trustee and no employees of the Board of Trustees shall have any direct interest in the gains or profits of any investment made by the Board of Trustees or their designees, nor as such receive any pay or emolument for his services, except as authorized from time to time by the Board of Estimates. No trustee or employee of the Board shall, directly or indirectly, for himself or as an agent in any manner use said gains or profits, except to make such current and necessary payments as are authorized by the Board of Trustees; nor shall any trustee or employee of the Board of Trustees become an endorser or surety or in any manner an obligor for moneys loaned by or borrowed from the Board of Trustees.

(f) Trustee Fiduciary Liability. Neither the Board of Trustees nor any agent, person or other entity acting on behalf of the Board of Trustees shall be liable for the making, retention or sale of any investment or reinvestment made as herein provided, nor for any loss or diminution of the funds, except that due to his or its own gross negligence, wilful misconduct or lack of good faith.

(g) Custodian and Supervision of Funds. The City official designated in the Charter of Baltimore City (1964 Revision, as amended) shall be the custodian of the several funds of the Employees' Retirement System. Supervision of the several funds of the Employees' Retirement System shall be vested in the Board of Trustees. Subject to the approval of the Board of Estimates, the Board of Trustees may hire and appoint such persons, agents or entities (including corporate fiduciaries) as in its discretion may be required or advisable to enable it to perform such pension fund investment management duties hereunder; provided further, that subject to the approval of the Board of Estimates the Board of Trustees may enter into agency and pension fund investment management agreements with one or more qualified pension fund managers for the purpose of obtaining pension fund investment management for the Employees' Retirement System and the several funds thereof. Payment for such investment management services shall be made from the resources of the pension fund or funds.

* * *

(h) Prudent Investment of Funds. The Board of Trustees shall discharge its duties, with respect to the investment of the funds of the Employees' Retirement System, solely in the interest of the members and beneficiaries and:

(1) For the exclusive purpose of:

(i) providing benefits to members and beneficiaries; and

(ii) defraying reasonable expenses of administering the Retirement System;

(2) With the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(3) By diversifying the investments of the Retirement System's funds so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(4) In accordance with the provisions of Section 7 of this subtitle. (Ord. 492, 1985; Ord. 765, 1986; Ord. 779. 1986; Ord. 988, 1987[2]; Ord. 58, 1988; Ord. 275, 1989).

[1983 Repl. Vol.; 1989 Supp.]

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[2]Sections 2 and 3 of Ordinance 988, 1987 provide as follows:

"Sec. 2. And be it further ordained, That notwithstanding the provisions of Section 42 of this Article 22, the provisions and benefits of this Ordinance 988, 1987, shall be repealed or modified by future ordinances, if necessary, in order to comply with Federal law and/or regulations. Such changes may result in the restructuring of the provisions of this ordinance which could result in reduced benefits to members, retirees and/or beneficiaries of retirees.

Sec. 3. And be it further ordained, That this Ordinance shall take effect on July 1, 1987 and shall apply only with respect to members who are employees after June 30, 1987."

(17)(e) Benefit increases to be paid only from Paid Up Benefit Fund and Contingency Reserve Fund.

(i) Any benefit increase provided under this section shall be funded on a single premium paid up annuity basis. The words "Single Premium paid up annuity basis" shall have the common actuarial meaning of spreading the amount available to provide a benefit over the lifetime of an individual in the form of an annuity. It is intended that any such benefit increase shall continue for the lifetime of the eligible member and any beneficiary, consistent with any option elected under Sections 6 or 9. The foregoing Contingency Reserve Fund has been established to insure payment of previously accrued benefit increases for any year in which the Paid Up Benefit Fund does not meet its interest assumption.

(ii) The granting of any benefit increase under this section is contingent on the performance of the retirement system's investment funds. The continuation of any benefit increase previously accrued under this section is specifically made contingent on the ability of the Paid Up Benefit Fund and the Contingency Reserve Fund to provide such benefits in the future. Section 10 and Section 42 to the contrary notwithstanding, any benefit increase provided under this section shall not become an obligation of the City of Baltimore. In the event of any conflict between Section 10 and/or Section 42 and this section, the terms of this section shall prevail.

(iii) If the performance of the retirement system's investment funds cause a decline in the value of the Paid Up Benefit Fund and the Contingency Reserve Fund, with the result that full benefit increases previously accrued under this section cannot be continued, then the trustees shall reduce or eliminate previously accrued increases on an equal percentage basis, effective as of January 1 following the June 30 on which a deficit exists. An equal percentage reduction shall be made to all benefits granted under this Section regardless of when such increases were granted. If the Paid Up Benefit Fund and the Contingency Reserve Fund should become exhausted or decline in value to the point of having no value, previously

accrued increases shall be eliminated in full. Any excess investment earnings available under (c) above in a subsequent year shall be used to provide an increase in benefits without regard to any prior reduction or elimination of benefit increases previously accrued.

[1983 Repl. Vol.]

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23. Management of funds.

(a) Trustee of funds. The Board of Trustees shall be the trustees of the several funds of the Elected Officials' Retirement System of Baltimore created under the provisions of this subtitle. The Board shall have the power to invest and reinvest such funds as provided for in Section 7 of this Article 22.

(b) The provisions of Section 7(a)(13) of this Article 22, concerning the divestment of funds in firms doing business in or with South Africa or Namibia, shall appy to the several funds of the Elected Officials' Retirement System of Baltimore. (Ord. 1105, 1983; Ord. 792, 1986.)

[1989 Supp.]

* * * *

35. Management of funds.

(a) Trustee of funds. The Board of Trustees shall be the trustees of the several funds of the Fire and Police Employees' Retirement System of Baltimore created by Article 22 under this subtitle as provided in Section 36. The Board of Trustees shall have the power to invest and reinvest such funds in the following types or classes of assets subject to the limitation, if any, as set forth with regard to each type or class of investment.

* * *

(1) Deposits in savings accounts, or other evidences of deposits in national or state banks and trust companies.

To the extent that such an investment or account is insured by the Federal Savings and Loan Insurance Corporation, or by the Maryland Savings Share Insurance Corporation, said Trustees may invest in shares of savings and loan associations or building and loan associations in the State of Maryland.

(2) Interest-bearing bonds, notes, certificates of indebtedness, bills or other direct interest-bearing obligations fully guaranteed both as to principal and interest by the United States of America, or by Canada, and obligations of the International Bank for Reconstruction and Development and obligations of the Inter-American Development Bank.

(3) Interest-bearing bonds of any state, District of Columbia, territory or possession of the United States of America, or of any province of Canada, or of any county, or incorporated city of any state, District of Columbia, territory or possession of the United States of America or any Canadian municipality.

(4) Interest-bearing bonds of any commission, instrumentality, authority or political subdivision having legal authority to issue the same, of the United States of America, Canada, any state, District of Columbia, territory or possession of the United States of America or of any province of Canada, or of any county or incorporated city of any state, District of Columbia, territory or possession of the United States of America or of any province of Canada.

(5) Interest-bearing bonds, notes or other interest-bearing obligations of any corporation organized under the laws of the United States of America or of Canada or province thereof, or under the laws of any state, District of Columbia, territory or possession of the United States of America. Equipment trust obligations or certificates or other secured instruments evidencing an interest in transportation or other equipment wholly or in part within the United States of America or Canada with a right to receive determined portions of

rental, purchase price or other fixed obligatory payments for the use or purchase of such transportation or other equipment.

(6) Publicly-traded preferred or common stock or shares of any corporation created or existing under the laws of the United States of America, Canada or province thereof, or of any state, District of Columbia, territory or possession of the United States of America; provided, however, that such investments in stocks shall not exceed fifty per cent (50%) of the total market value of all the assets of the funds of the Fire and Police Employees Retirement System referred to herein. An evaluation of the total assets of the Retirement System shall be made at least once in every three (3) months, for the purpose of maintaining this fifty per cent (50%) limitation.

(7) Covered call options may be sold by the Fire and Police Employees Retirement System when the underlying common stock is held in the equity portfolio and when such options are actively traded on a public exchange, provided, however, that options are not sold on more than twenty-five per cent (25%) of the total market value of common stocks held in the portfolio. Purchase of options will be permitted only when closing out a previously written covered call option.

* * *

(8)(i) Loans secured by first mortgages, or deeds of trust, on unencumbered fee-simple or improved leasehold real estate in the District of Columbia or in any state of the United States of America or province of Canada. Whenever such loans are made upon fee-simple, or leasehold real estate which is improved by a building or buildings, the said improvements shall be insured against loss by fire and such other casualties as are included in extended coverage policies, and the said insurance policies shall contain the New York or Massachusetts standard mortgage clause or equivalent thereto and shall be delivered to the mortgagee as additional security for the said loans. Bonds, notes or other evidence of indebtedness secured by mortgages or deeds of trust which are guaranteed or insured by an instrumentality of the United States pursuant

to Acts of Congress, as heretofore and hereafter amended, known as the National Housing Act, Servicemen's Readjustment Act of 1944, and the Bankhead-Jones Farm Tenant Act; and neither the limitations of this section or any other law of this state requiring security upon which loans shall be made, or prescribing the nature, amount or forms of such security, or limiting the interest rates upon loans, shall be deemed to apply to such insured or guaranteed mortgage loans. Provided, however, that such investments in mortgages shall not exceed twenty-five percent (25%) of the total market value of all the assets of the funds of the Fire and Police Employees' Retirement System referred to herein and an evaluation of the total assets of the retirement system shall be made at least once in every three (3) months, for the purpose of maintaining this twenty-five percent (25%) limitation. Upon a foreclosure of its own mortgages or an acceptance of a deed in lieu of foreclosure by the Trustees, the said Trustees shall have the right to purchase, hold, operate, lease, manage, and/or sell the subject real estate.

(ii) Open and closed end real estate investment pools, direct real estate investments, and unrestricted mortgage investments with equity participation. Such investments shall be included in the twenty-five percent (25%) restriction of market value of assets provided for in Section 35(a)(8)(i), with the further limitation that these investments shall not exceed ten percent (10%) of the market value of all the assets of the retirement system's funds.

Provided, however, if any such investment is in the nature of a "real estate investment pool," as defined hereinafter, then such investment shall be subject to the following restrictions:

1. With the exception of an insurance company, the investment manager shall either be registered as an investment advisor or function through an investment advisor registered with the Securities Exchange Commission under the Investment Advisors Act of 1940.

2. With the exception of an insurance company, all funds of the real estate investment pool shall be held in a trust wherein the investment manager, trustees, and all persons or entities responsible for the management, control, custody, maintenance, or investment of the funds, or having any similar responsibility in the pools shall function in a fiduciary capacity in their relationship to the unit holders or investors in the pool.

3. If the investment is in an insurance company's real estate investment pool, the insurance company shall have the highest rating of A.M. Best Co., and all persons or entities responsible for the management, control, custody, maintenance or investment of the funds, or having any similar responsibility, shall function in a fiduciary capacity in their relationship to the unit holders or investors in the pool.

4. The trust agreement shall be tax exempt under the applicable provisions of the Internal Revenue Code, Sections 401 and 501(a) or subsequent amendments or revisions thereto. In the case of insurance company pools, the pools shall satisfy the applicable requirements of the Internal Revenue Code, as amended, so that the insurance company does not pay federal income tax on the earnings of the separate accounts of such pools.

5. The trust funds of the real estate investment pool shall be immune from suit, and exempt from attachment by any creditor of any person, corporation or other entity that is responsible for the management, custody, control, maintenance, or investment of the funds, or having any similar responsibility in said pool, under any local, state, or federal law. Title to all assets of a separate account of an insurance company's real estate investment pool shall be held solely in the corporate name of the insurance company itself, and under applicable law such assets shall not be chargeable with liabilities arising out of any other business which the insurance company may conduct.

6. The real estate investment pool trust or any other agreement for such investment shall not violate the provisions of the Internal Revenue Code, Sections 401 and 501(a) or any subsequent revisions or amendments thereto, under which the Fire and Police Employees' Retirement System is qualified.

7. All unit holders or qualified investors in such a pool shall be pension or employee benefit plans or trusts qualified under Internal Revenue Code, Sections 401 and/or 501(a), or a governmental plan under Sections 414(d) and/or 818(a)(6).

8. For the purposes of this section, a real estate investment pool shall mean any investment wherein the retirement system places certain funds into a commingled trust, or a commingled separate account of a life insurance company, and wherein the trust or insurance company utilizes said funds to make certain real estate investments in the District of Columbia, or in any state of the United States of America or province of Canada, and wherein each such investor owns through units a certain equity in the investment.

* * *

(9) Ground rents in the State of Maryland.

(10) Interest, rents or other fixed income due and accrued on any of the investments authorized in the preceding subsections.

(11) Short Term Investment Funds established, operated and maintained by the contract custodian of the assets of the Fire and Police Employees' Retirement System, for the collective investment and re-investment of funds received and held by it as Trustee, Co-Trustee, or in any other fiduciary capacity described in Subtitle 5 of Title 3 of the Financial Institutions Article of the Annotated Code of Maryland (1980 Volume), or any amendment, supplement, or successor thereto or recodification thereof, which Short Term Investment Fund

has been qualified under the provisions of Section 401(a) and exempt from Federal income taxation under Section 501(a) of the Internal Revenue Code of 1945, as amended, and which is used as a temporary investment/cash management vehicle; provided that investment in such Short Term Investment Fund may be made from uninvested cash reserves held by the contract custodian, or from funds designated by the Investment Managers of the Fire and Police Employees' Retirement System funds. In connection with the participation of the Fire and Police Employees' Retirement System in such Short Term Investment Fund, where required by law or the terms of the Short Term Investment Fund, the Declaration of Trust establishing such Short Term Investment Fund is hereby adopted and made a part of the Fire and Police Employees' Retirement System to the extent such instrument does not violate the Internal Revenue Code or other applicable law and does not affect the tax qualification of the Fire and Police Employees' Retirement System, and any funds of such System invested in the Short Term Investment Fund shall be subject to all the provisions thereof, as the same may be amended from time to time.

(12) Asset Lending of securities which are under the custody of the contract custodian of the assets of the Fire and Police Employees' Retirement System, provided that: (1) such securities are loaned in accordance with the procedures set forth in the Department of Labor Prohibited Transaction Exemption 81-6 Ruling (PTE 81-6), or applicable successor regulations; (ii) the Board of Trustees shall approve or authorize the designated Investment Managers to approve the securities to be loaned, the brokers to whom such securities are loaned, and the collateral to secure assets loaned; and provided further, that before any such assets are loaned, the Board of Trustees and the Director of Finance shall, pursuant to PTE 81-6 procedures enter into a master loan agreement with the contract custodian setting forth the procedures to be followed; the broker to whom such securities will be loaned; collateral arrangements; fees; and other applicable provisions; and such master loan agreement shall be approved prior to execution by the Board of Trustees, by the Director of Finance as the desig-

nated custodian of the assets of the Fire and Police Employees' Retirement System, by the City Solicitor and the Board of Estimates; provided, however, that the market value of securities loaned shall not exceed twenty-five percent (25%) of the total market value of all assets of the Fire and Police Employees' Retirement System on any day.

The Board of Trustees shall have the duty and responsibility of periodically determining investment policies consistent with the above limitations, the capital market environment, and the actuarial characteristics of the Fire and Police Employees Retirement System and to public such investment policy guidelines by filing a copy thereof with the Department of Legislative Reference of Baltimore City, and after January 1, 1979, also by publication in the Municipal Journal).

All contributions from time to time paid into the several funds, and the income thereof, without distinction between principal and income, shall be held and administered by the Board of Trustees or its agents in the funds, and the Board shall not be required to segregate or invest separately any portion of the funds.

Provided, however, that nothing in this amendatory ordinance shall be deemed to render illegal or to invalidate the making and holding of any investment heretofore made and now remaining in said funds where such investment when made was authorized by law prior to the enactment of this amendatory ordinance; and provided further, that nothing herein shall be deemed to prevent the Board of Trustees from accepting, in lieu or substitution of securities representing investments heretofore validly made, other securities not of the kind enumerated but authorized by ordinance as investments for the said Board prior to the enactment of this amendatory ordinance, where the Board shall deem such substitution of securities desirable to preserve the investment of the said funds. Subject to the terms, provisions and conditions contained herein, said Trustees shall have full power to hold, purchase, sell, assign, transfer, and dispose of any of the secu-

rities and investments in which any of the funds created herein shall have been invested, as well as the proceeds of said investments and any moneys belonging to said funds.

* * *

(13)[3](i) On the first day of the third quarter of fiscal year 1987, no monies or funds held under any provision of the retirement system shall remain invested or hereinafter by

---

[3]Sections 2 and 3 of Ord. 765, 1986 provide as follows:

"Sec. 2. And be it further ordained,

(a) That, subject to the provisions of this section, the divestiture required by Section 1 of this ordinance shall be completed with the time limit established in this ordinance.

(b) That the time limit shall begin on the first day of the third quarter of fiscal year 1987.

(c) That during the time limit the Board of Trustees of the retirement systems shall make quarterly reports to the Mayor and City Council concerning the progress of divestiture.

(d) That, during the time limit, the Board of Trustees of the retirement systems may from time to time suspend the divestiture program provided the suspending Board adopts a resolution pursuant to this section.

(e) That when a Board of Trustees of either retirement system adopts a resolution suspending the divestiture program under this section, the suspending Board shall find as follows:

(1) That the rate of return on the funds are substantially lower than the average of the annual earnings on the funds over the past five years, and

(2) That continued divestiture under this ordinance will be inconsistent with generally accepted investment standards for conservators of pension funds notwithstanding the intent of this ordinance, or

(3) That divestiture under the divestiture program will cause financial losses to the funds.

(f) That when a Board of Trustees of the retirement systems adopts a resolution suspending the divestiture program under this section, the resolution shall:

(1) State the standards and conclusions for the suspension;

(2) Set forth the duration of the suspension and the time of resumption of the divestiture program; however, the period of suspension shall not exceed 90 days and the time limit shall be tolled for the period of suspension; and

(3) Be in writing and shall be sent to the Mayor, President of the City Council, and the Department of Legislative Reference.

Sec. 3. And be it further ordained, That the time limit for divestiture under this ordinance is 2 years."

invested in the stocks, securities or other obligations of any bank or financial institution which makes loans to the Republic of South Africa or Namibia, or to a national corporation of the Republic of South Africa or Namibia, or in the stocks, securities, or other obligations of any company doing business in or with the Republic of South Africa or Namibia, or whose subsidiary or affiliate does business in or with the Republic of South Africa or Namibia.

(ii) Business entities doing business in or with the Republic of South Africa shall be identified by reference to the most recent annual report of the African Fund entitled "Unified List of United States Companies with Investments or Loans in South Africa and Namibia."

(iii) Business entities doing business in or with the Republic of Namibia shall be identified through correspondence with the United Nations' Office of the Commissioner for Namibia and the United Nations' Center for Transnational Corporations.

(b) Interest. As of July 1, 1978, the Trustee will determine the "carrying value" of the fund in accordance with the asset valuation method theretofore employed, and the "adjusted market value" of the fund representing an average fair market value as of that date.

During the 1979 fiscal year, the Trustees will establish a "reserve for book value" as of July 1, 1978, equal to the difference as of that date between the carrying value and the adjusted market value of the fund. On that date and on each annual valuation date thereafter, the value of the fund assets for actuarial valuation purposes will be carried at (1) the then current adjusted market value, plus (2) the reserve for book value.

The Board of Trustees annually shall credit regular interest less the investment management, custodian and investment advisor costs on the mean amount for the preceding year in each of the funds. After payment of pension fund manage-

ment, custodian, and investment advisor services as provided in Sections 35(g) and 43(a), any excess of the earnings of the funds of this retirement system as determined in accordance with an appropriate asset valuation method giving effect to actual earnings of the funds, over the earnings based on the regular interest rate used for valuation purposes shall first be applied by the Board of Trustees to meet the conditions of any asset averaging method then in use under the system.

An additional amount equal to one and one-half percent of the mean amount for the preceding year in each of the funds will be deducted from the remaining excess earnings, if any, and applied by the Board of Trustees to reduce the remaining balance, if any, in the "reserve for book value"; to the extent the excess earnings are less than one and one-half percent per annum, the City of Baltimore shall contribute the difference to the "reserve for book value", average over a five year period in accordance with the asset valuation method theretofore employed. The remaining excess earnings, if any, shall next be applied by the Board in such amount or amounts as they determine (1) to decrease the amount contributed by the City of Baltimore, and/or (2) to decrease the period over which the unfunded accrued liability will be amortized as provided in Section 36(d)(4), and/or (3) to reduce the remaining balance, if any, in the "reserve for book value". Any deficiency of the earnings of the funds of this retirement system, as determined in accordance with an appropriate asset valuation method giving recognition to actual earnings of the funds, below the required earnings based on the regular interest rate used for valuation purposes shall first be applied to meet the conditions of any asset averaging method then in use under the system; the remaining deficiency in earnings, if any, shall be applied by the Board of Trustees in such amount or amounts as they determine either (1) to increase the amount contributed by the City of Baltimore, and/or (2) to increase the period over which the unfunded accrued liability will be amortized as provided in Section 36(d)(4).

The increase or decrease of contribution and/or the increase or decrease in length of amortization period shall be

determined by the Board after receiving the advice of the actuary engaged by the City, on the basis of regular interest rate used for valuation purposes, and of such mortality and other tables as shall be adopted by the Board of Trustees.

The Board of Trustees shall use such portion of the net unallocated interest surplus (if any) as is deemed necessary by the actuary to cover the cost to the City of Baltimore which may result from the implementation of Ordinance 762, 1986, effective July 1, 1986.

Any unallocated interest surplus in the retirement system as of July 1, 1987, shall be applied to reduce the unfunded accrued past service liability of the system.

(c) Cash on Deposit. For the purpose of meeting disbursements for pensions, annuities, and other payments, there may be kept available cash on deposit in one or more banks or trust companies located in the City of Baltimore, organized under the laws of the State of Maryland or of the United States, in such amount as the Trustees may by resolution from time to time adopt, not exceeding a sum equal to the estimated disbursements projected for a period of fifteen days. The sums on deposit in bank shall be secured by collateral posted by the depositories of such type and amount as the Commissioners of Finance may prescribe, but in no event shall the market value of such collateral be less than one hundred per cent of the amount on deposit according to the depositories' records. In exercising this authority for bank deposits, the Trustee shall endeavor to minimize the amount of such deposits, and shall consider appropriate money management techniques, including wire transfers of funds and the zero-balance-fee-for-service method of maintaining bank balances. In no event shall the bank accounts be used as the basis for, or be used to provide supplementary compensation for such investment administrators.

(d) Securities Handling. The Custodian designated in the Charter of Baltimore City (1964 Revision, as amended) may cause any investment in securities held by the Trustees to

be registered in or transferred into the name of the Trustees or into the name of such nominee as the Custodian may direct, including a nominee partnership created by the Board of Trustees, or the Custodian may retain them unregistered and in form permitting transferability, and further may authorize its contractual agents to deposit securities with "clearing corporations" as defined in Section 8-102 of Article 95B of the Annotated Code of Maryland for the express purpose of having such clearing corporations act as centralized depositories of such securities, but the books and records of the Custodian and its contractual agents shall at all times show that all such investments are part of the several funds of the Fire and Police Employees Retirement System. The authority to make use of a clearing corporation shall include the authority to utilize the "book entry" system of the United States Government, and agencies thereof, for which the Federal Reserve Bank is the authorized fiscal agent.

(e) Conflicts of interest. Except as otherwise herein provided, no trustee and no employee of the Board of Trustees shall have any direct interest in the gains or profits of any investment made by the Board of Trustees or their designees, nor as such receive any pay or emolument for his services, except as authorized from time to time by the Board of Estimates. No trustee or employee of the Board shall, directly or indirectly, for himself or as an agent in any manner use said gains or profits, except to make such current and necessary payments as are authorized by the Board of Trustees; nor shall any trustee or employee of the Board of Trustees become an endorser or surety or in any manner an obligor for moneys loaned by or borrowed from the Board of Trustees.

(f) Trustee Fiduciary Liability. Neither the Board of Trustees nor any agent, person or other entity acting on behalf of the Board of Trustees shall be liable for the making, retention or sale of any investment or reinvestment made as herein provided, nor for any loss or diminution of the funds, except that due to his or its own gross negligence, wilful misconduct or lack of good faith.

(g) Custodian and Supervision of Funds. The City official designated in the Charter of Baltimore City (1964 Revision, as amended) shall be the custodian of the several funds of the Fire and Police Employees Retirement System. Supervision of the several funds of the Fire and Police Employees Retirement System shall be vested in the Board of Trustees. Subject to the approval of the Board of Estimates, the Board of Trustees may hire and appoint such persons, agents or entities (including corporate fiduciaries) as in its discretion may be required or advisable to enable it to perform such pension fund investment management duties hereunder; provided further, that subject to the approval of the Board of Estimates the Board of Trustees may enter into agency and pension fund investment management agreements with one or more qualified pension fund managers for the purpose of obtaining pension fund investment management for the Fire and Police Employees Retirement System and the several funds thereof. Payment for such investment management services shall be made from the resources of the pension fund or funds.

(h) Prudent investment of funds. The Board of Trustees shall discharge its duties, with respect to the investment of the funds of the Fire and Police Employees' Retirement System, solely in the interest of the members and beneficiaries and:

(1) For the exclusive purpose of:

(i) providing benefits to members and beneficiaries; and

(ii) defraying reasonable expenses of administering the retirement system;

(2) With the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(3) By diversifying the investments of the retirement system's funds so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(4) In accordance with the provisions of Section 35 of this subtitle. (Ord. 492, 1985; Ord. 762, 1986; Ord. 765, 1986; Ord. 779, 1986; Ord. 794, 1986; Ord. 58, 1988; Ord. 123, 1988.)

APPENDIX C

FIRE AND POLICE EMPLOYEES' RETIREMENT SYSTEM OF THE CITY OF BALTIMORE, MARYLAND

ANNUAL FINANCIAL REPORT FOR THE FISCAL YEAR ENDED JUNE 30, 1986

Prepared by:

Ernest J. Glinka, Administrator
Thomas P. Taneyhill, CPA, Deputy Administrator
Charles W. Parker, Accountant Supervisor

* * *

Fire and Police Employees' Retirement System
City of Baltimore, Maryland

NOTES TO FINANCIAL STATEMENTS

1. The Reporting Entity:

The Fire and Police Employees' Retirement System of the City of Baltimore (F&P) is a defined benefit local retirement plan covering officers and most employees of the Fire and Police Departments. Established July 1, 1962, the plan is managed by a Board of Trustees in accordance with Article 22 of the Baltimore City Code. Prior to the above date, all fire and police personnel were members of the Employees' Retirement System. Upon the creation of the F&P, eligible personnel automatically transferred thereto except for those who elected to remain in the Employees' Retirement System, the plan which covers City employees with the exception of those required to join the F&P, the Maryland State retirement systems, or the Elected Officials' Retirement System.

Based on the reporting entity oversight responsibility criteria, as defined by the National Council on Governmental Accounting Statement #3, the F&P is a component unit of the City of Baltimore, the oversight unit, and is reported as such. Oversight responsibility is derived from the governmental unit's power and includes, but is not limited to financial interdependency, designation of management, ability to significantly influence operations, and accountability for fiscal matters. The F&P does not exercise oversight responsibility for any other unit.

* * * *

EMPLOYEES' RETIREMENT SYSTEM
OF THE
CITY OF BALTIMORE, MARYLAND

ANNUAL FINANCIAL REPORT
FOR THE
FISCAL YEAR ENDED JUNE 30, 1986

Prepared by:

Ernest J. Glinka, Administrator
Thomas P. Taneyhill, CPA, Deputy Administrator
Charles W. Parker, Accountant Supervisor

* * *

Employees' Retirement System
City of Baltimore, Maryland

NOTES TO FINANCIAL STATEMENTS

1. The Reporting Entity:

The Employees' Retirement System of the City of Baltimore (ERS), a defined benefit local retirement plan, established January 1, 1926, is administered in accordance with Article 22 of the Baltimore City Code. The plan covers most employees of the City with the exception of those required to join the Maryland State retirement systems, the Fire and Police Employees' Retirement System, or the Elected Officials' Retirement System.

Based on the reporting oversight responsibility criteria, as defined by the National Council on Governmental Accounting System #3, the ERS is a component unit of the City of Baltimore, the oversight unit, and is reported as such.

Oversight responsibility is derived from the governmental unit's power and includes, but is not limited to financial interdependency, designation of management, ability to significantly influence operations, and accountability for fiscal matters. The ERS does not exercise oversight responsibility for any other unit.

* * * *

ELECTED OFFICIALS' RETIREMENT SYSTEM OF THE CITY OF BALTIMORE, MARYLAND

ANNUAL FINANCIAL REPORT FOR THE FISCAL YEAR ENDED JUNE 30, 1986

Prepared by:

Ernest J. Glinka, Administrator
Thomas P. Taneyhill, CPA, Deputy Administrator
Charles W. Parker, Accountant Supervisor

* * *

Elected Officials' Retirement System
City of Baltimore, Maryland

NOTES TO FINANCIAL STATEMENTS

June 30, 1986

1. The Reporting Entity:

The Elected Officials' Retirement System of the City of Baltimore (EOS), a defined benefit local retirement plan, established December 5, 1983, is administered in accordance with Article 22 of the Baltimore City Code. The plan covers the Mayor, the Comptroller, and the President and all members of the City Council. All elected Baltimore City officials are required to join except for those officials who are members of the Employees' Retirement System of the City of Baltimore who may choose to remain members of that system. At the above date two officials in the Employees' Retirement System chose to remain members thereof.

Based on the reporting entity oversight responsibility criteria, as defined by the National Council on Governmental Accounting Statement #3, the EOS is a component unit of the City of Baltimore, the oversight unit, and is reported as such. Oversight responsibility is derived from the governmental unit's power and includes, but is not limited to financial interdependency, designation of management, ability to significantly influence operations, and accountability for fiscal matters. The EOS does not exercise oversight responsibility for any other unit.

* * * *

3

No. 89-889

In The

Supreme Court of the United States

October Term, 1989

YALE LUBMAN, THOMAS J. MURPHY,
JOHN S. SEISS, and JOSEPH STEWART,

Petitioners,

v.

MAYOR and CITY COUNCIL OF
BALTIMORE CITY,

Respondents.

Petition For A Writ Of Certiorari
To The Maryland Court Of Appeals

AMICUS CURIAE BRIEF OF ROBERT F. CARLSON

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No. 89-889

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v.

MAYOR and CITY COUNCIL OF BALTIMORE CITY,

Respondents.

Petition for a Writ of Certiorari to the Maryland Court of Appeals

AMICUS CURIAE BRIEF OF ROBERT F. CARLSON

INTERESTS OF AMICUS CURIAE

Pursuant to Supreme Court Rule 36, Robert F. Carlson, a member and past president of the Board of Administration of the California Public Employees' Retirement System (PERS) and an attorney admitted to practice before this Court and a member of the California State Bar, acting on his own

behalf, pro se, respectfully submits this brief amicus curiae in support of petitioners, Yale Lubman, Thomas J. Murphy, John S. Seiss, and Joseph Stewart and their petition for writ of certiorari. Written consent to the filing of this brief has been granted by counsel for all parties. Copies of the written consents have been lodged with the Clerk of the Court.

Amicus, Robert F. Carlson, is Adjunct Professor of Law, University of the Pacific, McGeorge College of Law, and currently is and has been an elected member of the governing board of PERS since 1971, and was president of the board from 1975 to 1985. In addition, he is a member of the boards of directors of various public benefit corporations and the Franklin Group AGE Mutual Fund administering assets of over $2 billion.

Effective January 1, 1987, the California State Legislature passed legislation directing that all state trust funds including funds administered by PERS be divested of "investments in business firms with business operations in South Africa or business arrangements with the government of South Africa, and in financial institutions making or increasing loans or other extensions of credit to the government of South Africa or any South African corporation." Cal. Gov't Code § 16644. Effective January 1, 1991, state trust funds shall not hold any investments in any business firm with operations in South Africa or business arrangements with the government of South Africa. Gov't Code § 16645.

The PERS board is responsible for administering the largest public retirement fund in the nation. It currently administers $56 billion in investments that are subject to the legislative divestment required by Government Code §§ 16640-16649. This includes funds supporting the State of California Public Employees' Retirement System, the California Judges' Retirement System, and the Legislators' Retirement System. It also administers under contract retirement funds of numerous California cities, counties, and local agencies also

subject to the divestment statute.

Divestiture mandated by the state legislature has resulted in reduced total return to the retirement systems administered by PERS and has resulted in increased administration costs associated with the sale of divested securities and the purchase of replacement investments.

As reported to the PERS board by its chief investment officer, the Public Employees' and Legislators' Retirement Systems have experienced the loss of potential total returns through September 30, 1989, of 1.21% annually or approximately $167,000,000 per year. Additional brokerage and other charges associated with divestment and the purchase of alternative investments have been incurred by PERS.

As of December 31, 1987, prior to the effective date of the statute, the Public Employees' Retirement System held a total market value of $3,525,037,207 invested in firms with business connections in South Africa requiring divestiture. This represented 8.42% of the total investment portfolio as of that date.

Amicus urges this Court to review the opinion of the Maryland Court of Appeals which upheld the validity of a divestment ordinance enacted by the City of Baltimore which is very similar to the legislation enacted by the California Legislature. Only by review of this Court can other states, cities, trustees, directors, fiduciaries, beneficiaries, and participating employers determine whether the actions mandated by legislative bodies, other than the Congress, requiring divestiture of investments in businesses associated with South Africa are consistent with the requirements of the United States Constitution and federal law.

As a member of the board of PERS, amicus herein has a personal, real, and fiduciary interest in having this Court review the decision below. This is particularly true since it appears that the divestiture policies being applied by the City of Baltimore, by California, and other states and local entities

have been preempted by federal law and contravene several provisions of the United States Constitution.

As a member of the PERS Board of Administration amicus has a fiduciary responsibility, as do the City of Baltimore trustees, to comply with prudent investment standards and maximize returns to the beneficiaries. The California Constitution, Article XVI, § 17, sets forth those standards for any public pension or retirement system as follows:

> "(b) The fiduciary of the public pension or retirement system shall discharge his or her duties with respect to the system solely in the interest of, and for the exclusive purposes of providing benefits to, participants and their beneficiaries, minimizing employer contributions thereto, and defraying reasonable expenses of administering the system.
>
> "(c) The fiduciary of the public pension or retirement system shall discharge his or her duties with respect to the system with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with these matters would use in the conduct of an enterprise of a like character and with like aims.
>
> "(d) The fiduciary of the public pension or retirement system shall diversify the investments of the system so as to minimize the risk of loss and to maximize the rate of return, unless under the circumstances it is clearly prudent not to do so."

STATEMENT OF THE CASE

This case very simply involves the validity of an ordinance of the City of Baltimore mandating divestment and prohibiting future investment of retirement system funds, which ultimately inure to the benefit of the retiree-beneficiaries, in any

company doing business in or with South Africa. This is very similar to divestiture statutes and ordinances recently enacted by other cities and states, including the State of California, in reaction to the outrageous apartheid system that exists in South Africa.

REASONS FOR GRANTING CERTIORARI

I

THIS CASE PRESENTS IMPORTANT ISSUES OF LAW THAT ONLY THIS COURT CAN RESOLVE

A. Introduction

Shortly after the enactment of the California legislation an article was published in the University of the Pacific, McGeorge School of Law, Pacific Law Journal entitled "Challenges to the Constitutionality of the California Divestment Statute," 19 Pac. L. J. 217 (1987) (Pacific Law Journal article). This comprehensive article analyzed the California statute in great detail. It unequivocally concludes that such legislation is constitutionally invalid and preempted by federal action.

B. Federal Preemption

With the enactment of the Comprehensive Anti-Apartheid Act of 1986, 22 U.S.C. §§ 2151, 2346(a), 5001-5116 Congress has expressly or at least impliedly occupied the entire field of regulation regarding apartheid. The Federal Anti-Apartheid Act does not contain an express preemption provision, but since the Baltimore ordinance in restricting new investments in South Africa is in direct conflict with the federal Act and is inconsistent with the objectives of the federal statute the ordinance is preempted, as is any similar ordinance or statute. Rice v. Santa Fe Elevators, 331 U.S. 218 (1947). Due to the

comprehensive character of the federal Act and the fact that the conduct of foreign affairs is a dominant federal interest the Court may infer an intent by Congress to preempt state action. Pacific Law Journal at 223-29.

Also in City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973), federal preemption over noise regulation at airports was inferred from the Federal Aviation Act in the regulation of air space. This was largely based on the provision in the Act expressing an interest in protecting persons on the ground as well in controlling the use of the airspace and precluded more restrictive local noise requirements. Likewise here, the Comprehensive Anti-Apartheid Act precludes more restrictive local divestment requirements.

1. The Commerce Clause

The Baltimore ordinance necessarily affects both interstate and foreign commerce. The only question is whether the ordinance comes within an exception. The Baltimore court determined that such an exception exists. However as stated in the Pacific Law Journal article at 230-31 neither moral outrage nor protection of funds falls within an exception:

> "The primary purpose of [the legislation] is to condemn and to attempt to eliminate the system of apartheid. Traditionally, legitimate purposes for commerce clause analysis have been limited to the protection of health, safety, and financial prosperity of the people and industries of the State. Expression of moral outrage has never been found by the courts to constitute a legitimate purpose. ... A second purpose behind [the legislation] is the protection of the investment of trust funds. ... This may be a plausible purpose, if the businesses depended upon their South

> African connection for their continued viability. ... Since no legitimate local benefit is furthered by the legislation, any imposition on interstate commerce would be a violation of the commerce clause."

Nor does the narrow "market participant" exception appear applicable. The state may be viewed as a "private trader" in securities, but South-Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82 (1984), held that the "market" must be narrowly defined. Any attempt to impose conditions outside the participant's market will be regulatory action and not as a market participant. To be a market participant Baltimore would need to be the issuer of securities rather than acting as a buyer or seller.

In addition, it is obvious that divestment was not enacted primarily to benefit local residents. Instead its purpose was regulatory in nature designed to provide economic coercion on South Africa as a means toward dismantling apartheid.

In any event it appears from language in South-Central that the market participant doctrine will not apply in regard to foreign commerce.

2. Foreign Commerce and Foreign Policy

The Constitution clearly vests the federal government with exclusive authority over foreign commerce and foreign policy. Only the Congress has power to "regulate commerce with foreign nations." Art. I, § 8(4).

This Court has previously protected the exclusive nature of the federal government in the area of foreign relations. In Hines v. Davidowitz, 312 U.S. 52 (1941), this Court invalidated a Pennsylvania statute requiring adult aliens to register annually with the state:

> "The Federal Government, representing as it does the

collective interests of the forty-eight states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties. ... Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference." Id. at 63.

Similarly, in Zschernig v. Miller, 389 U.S. 429 (1968), this Court invalidated an Oregon statute which conditioned the claim of a nonresident alien to real property on the recognition in the foreign country of a reciprocal right of a United States citizen to take property on the same terms as a citizen of that country. This cold war effort involved the state in "foreign affairs and international relations--matters which the Constitution entrusts solely to the Federal Government." Id. at 436.

II
ONLY THE SUPREME COURT CAN PROVIDE FIDUCIARIES WITH THE NEEDED ANSWER ON THE CONSTITUTIONALITY OF DIVESTITURE

As detailed in the Petition for Writ of Certiorari (Pages 8-10) many states and cities are enacting divestment statutes in reaction to various social policies that impact foreign policy and foreign commerce. These include reaction to the treatment of Catholics in Northern Ireland, students in the People's Republic of China, "nuclear free zones" as well as apartheid in South Africa and a lack of "human rights" in the Union of Soviet Socialist Republics.

Trustees responsible for administering the hundreds of billions of dollars of assets in employee pension funds have fiduciary responsibilities to act in the sole interest of the

beneficiaries and participants in the fund and to maximize returns with care, skill, prudence, and diligence. Divestiture statutes conflict directly with these principles and should not be followed if they are invalid.

The Maryland decision is in conflict with decisions of other states such as Illinois, New York, and Michigan. See Springfield Rare Coin Galleries, Inc. v. Johns, 115 Ill. 2d 221, 503 N.E.2d 300 (1986); New York Times Company v. City of New York Commission on Human Rights, 41 N.Y.2d 345, 361 N.E.2d 963 (1977); and Regents of the University of Michigan v. State of Michigan, 166 Mich. App. 314, 419 N.W.2d 773 (1988). In the Michigan case the Court of Appeals invalidated a statute precluding investment of university funds in organizations doing business in the Republic of South Africa or the Union of Soviet Socialist Republics.

Until this Court answers the constitutional issues raised by the Maryland decision fiduciaries such as amicus will have no way of knowing whether or not they are violating their fiduciary responsibilities in applying the divestiture policies dictated by local and state governments. Apparently the plaintiff trustees of the City of Baltimore Employees' Retirement System are content to rely on a decision from their state's highest court. Fiduciaries in other states do not enjoy that same comfort. Until this issue has been resolved finally one way or another fiduciaries, beneficiaries, and other participants in employee pension funds will be without guidance. And only this Court is in a position to provide that final and definitive answer.

The Maryland High Court itself recognized the great importance of these federal and constitutional issues for review by this Court in granting petitioners' (beneficiaries') right of intervention. This was to insure that review of a decision adverse to the Baltimore trustees would not be foreclosed: "The prospect that the Trustees might not ask the United States Supreme Court to review an unfavorable ruling in the

Court is not entirely unlikely in light of past events. A decision not to seek Supreme Court review would adversely affect the [beneficiary] applicants, who would be bound by our ruling." Petitioners' Appendix, Exhibit D, Page 17.

CONCLUSION

This case presents issues of major importance which should be resolved by this Court. Resolution is important not only to the beneficiaries of Baltimore's retirement system. The members and beneficiaries of retirement systems throughout the country are impacted by similar laws.

One may readily sympathize with those communities which desire to exert pressure upon South Africa's uncivilized apartheid policies. But locally adopted divestiture ordinances intrude on areas of national interest. There are also high costs associated with this voicing of outrage in the manner chosen by Baltimore--costs that are borne, not by the citizens of the community taking the action, but instead by the beneficiaries of the retirement system. Serious questions are thus raised as to whether these beneficiaries alone can be asked to absorb these costs. Guidance is urgently needed on this issue of great national importance.

It is respectfully submitted that the Petition for Certiorari be granted.

DATED: January, 1990.

Respectfully submitted,

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(4)

No. 89-889

In The

Supreme Court of the United States

October Term, 1989

Yale Lubman, Thomas J. Murphy,
John S. Seiss and Joseph Stewart,
Petitioners

—v.—

Mayor and City Council of
Baltimore City,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI

**RESPONDENT'S SUPPLEMENTAL BRIEF
IN OPPOSITION**

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ON PETITION FOR WRIT OF CERTIORARI

RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION

Respondent Mayor and City Council of Baltimore, pursuant to Rule 15.7 of the Supreme Court Rules (January 1, 1990), submits the following Supplemental Brief in Opposition to Petition for Writ of Certiorari in order to address new matters raised in the Brief *Amicus Curiae* filed by Robert F. Carlson.

ARGUMENT

In his Brief *Amicus Curiae,* Robert F. Carlson ("Carlson") makes a number of unsupported assertions about the performance of California's Public Employees' Retirement System ("PERS"). These assertions are stated as fact, but Carlson offers no basis for them in any part of the record in this case, or, indeed, in any appendix or exhibit. *See* Brief *Amicus Curiae* at 2-3 (hereafter "Amicus Brief"). For instance, Carlson claims that the Public Employees' Retirement System administers 56 billion dollars in investments, Amicus Brief at 2, all of which is subject to the California divestment statute, Government Code §§ 16640-16649. In addition, Carlson claims the PERS and the Legislators' Retirement Systems' total returns have diminished 1.21% annually due to divestment, and have incurred significant other charges associated with divestment and purchase of alternative investments. *Id.* at 3.

Carlson's representations, however, ought not to be considered by this Court. There is not a scintilla of evidence in the record to support such claims as the total value of funds administered by PERS, the pension fund of another state, and claims of lost performance and costs incurred in divestment and repurchase. Similarly, there is no discussion in the Amicus Brief of important issues such as PERS' management style, investment targets, track record, etc. *Compare* P. App. at E-22-26. As important, neither the parties nor this Court have any way of knowing whether the scant representations that have been made have any basis in fact.

Indeed, judicial facts not a part of the record may not be considered by this Court. *See Adickes v. Kress,* 398 U.S. 144, 157-58 n.16 (1970) (unsworn statement of witness, not contained in record, could not be properly considered by Court); *Hopt v. Utah,* 114 U.S. 488, 491-92

(1885); *Russell v. Southard,* 12 How. 139, 158-59 (1851) ("This Court must affirm or reverse on the case as it appears in the record."). By contrast, the performance of the Baltimore City pension funds under the Baltimore City Ordinances ("the Ordinances") was carefully litigated and subject to intense scrutiny on the part of the trial court below and the Court of Appeals of Maryland. *See, e.g.,* P. App. at D-2-13 and E-21-26. The evidence presented involved "massive financial investment data, including charts, graphs, and intricate mathematical computations." *Id.* at E-21. Carlson's assertions about costs and losses associated with the divestment statute have not been subjected in this case to any of the tests of the adversary system and cannot be credited. Even if it were the case that certain losses or diminished returns have been sustained by the California PERS in recent years, it is not clear, without any fact and expert testimony under oath, that such losses stem in whole or in part from divestment.

In the remainder of his Brief, Carlson presents no new law or argument as to the merits of the Petition for Certiorari filed by the Beneficiaries of the pension funds.[1] Respondent reiterates that the Petition and Amicus Brief do not raise or implicate any substantial issue of federal constitutional or statutory law, and the Petition for Certiorari should be denied. If it is really true

[1]Carlson makes the surprising assertion, however, that the Comprehensive Anti-Apartheid Act ("CAAA") "does not contain an express preemption provision." Amicus Brief at 5. That assertion is directly contradicted by the language of the statute itself. Congress chose to preempt certain local and state actions, but expressly limited that preemption to state and local limitations on procurement. *See* 22 U.S.C. § 5116 (1989 Supp.) It is this very section, coupled with House Resolution 549 (1986) passed at the same time as the CAAA, in which the House affirmatively declared its intent that the CAAA not preempt local or state authority to pass ordinances such as the Baltimore City Ordinances, that places beyond dispute the assertion that the Ordinances are neither expressly nor impliedly preempted.

that "guidance is urgently needed", Amicus Brief at 10, by Carlson and other members of boards of pension funds around the country, the guidance may be provided by summary affirmance.

Respectfully submitted,
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